119-4 30

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1885.

No. ~~1275.~~ 849

FREDERICK M. KER, PLAINTIFF IN ERROR,

vs.

THE PEOPLE OF THE STATE OF ILLINOIS.

IN ERROR TO THE SUPREME COURT OF THE STATE OF ILLINOIS.

FILED MARCH 1, 1886.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1885.

No. 1275.

FREDERICK M. KER, PLAINTIFF IN ERROR,

vs.

THE PEOPLE OF THE STATE OF ILLINOIS.

IN ERROR TO THE SUPREME COURT OF THE STATE OF ILLINOIS.

INDEX.

	Original.	Print.
Caption	1	1
Transcript from Criminal court of Cook county	1	1
Caption	1	1
Indictment	2	1
Order for continuance	15	8
Arraignment	17	9
Plea to jurisdiction	17	10
Demurrer to plea to jurisdiction	25	13
Order sustaining demurrer, &c.	26	14
Jury called and trial commenced	28	15
Trial continued	29	16
Verdict	30	17
Order overruling motion for new trial	31	17
Judgment	32	18
Clerk's certificate	33	18
Assignment of errors	34	19
Submission	36	20
Judgment	37	20
Order denying re-hearing	38	21
Clerk's certificate	39	21
Assignment of error	40	22
Opinion	43	23
Clerk's certificate to opinion	74	35
Writ of error	75	36
Clerk's certificate and return to writ of error	77	37
Citation	78	37
Proof of service of citation	79	38

JUDD & DETWEILER, PRINTERS, WASHINGTON.

1 State of Illinois, Supreme Court, Northern Grand Division.

At a supreme court begun and held at Ottawa on Tuesday, the fourth day of March, in the year of our Lord one thousand eight hundred and eighty-four, within and for the northern grand division of the State of Illinois.

Present: Hon. Benj. R. Sheldon, chief justice; Pinkney H. Walker, justice; Jno. Schofield, justice; T. Lyle Dickey, justice; John H. Mulkey, justice; John M. Scott, justice; Alfred M. Craig, justice; James McCartney, attorney general; William R. Milligan, sheriff; Everell F. Dutton, clerk.

Be it remembered that heretofore, to wit, on the 13th day of February, A. D. 1884, there was filed in the office of the clerk of said court a certain transcript of the record and proceedings of the criminal court of Cook county, in a certain proceeding lately pending in that court wherein The People of the State of Illinois were plaintiffs and Frederick M. Kerr was defendant, which said transcript is in the words and figures following, to wit:

UNITED STATES OF AMERICA.

STATE OF ILLINOIS, } ss:
Cook County, }

Pleas before a branch of the criminal court of Cook county, in said county and State, at a term thereof begun and held at the criminal court-house, in the city of Chicago, in said county, on
2 the first Monday (being the fifth day) of February, in the year of our Lord one thousand eight hundred and eighty-three, and of the Independence of the United States the one hundred and seventh.

Present: Honorable Rollin S. Williamson, judge of the superior court of Cook county, *ex-officio* judge of the criminal court of Cook county; Luther Laflin Mills, State's attorney; Seth F. Hanchett, sheriff of Cook county.

Attest: JOHN STEPHENS, *Clerk.*

And afterwards, to wit, on the twenty-fourth day of February, A. D. 1883, it being the term of court aforesaid, the following among other proceedings were had and entered of record in said court, which said proceedings are in the words and figures following, to wit:

On this twenty-fourth day of February, A. D. 1883, it being the term of court aforesaid, the grand jury came into open court and made a certain presentment in writing, which said presentment, with all the endorsements thereon, is by order of the court entered of record and is in the words and figures following, to wit:

STATE OF ILLINOIS, } ss:
Cook County, }

Of the February Term of the Criminal Court of Cook County, in said County and State, in the year of our Lord one thousand eight hundred and eighty-three.

The grand jurors chosen, selected, and sworn in and for the county of Cook, in the State of Illinois, in the name and by the authority of the people of the State of Illinois, upon their oaths present that
Frederick Kerr, otherwise called Alfred Perrott, otherwise
3 called Warren Start, late of the county of Cook, on the first
day of February, in the year of our Lord one thousand eight
hundred and eighty-three, in said county of Cook, in the State of Illinois aforesaid,—seventy current United States of America Treasury bonds of the denomination of fifty dollars, of the value of fifty dollars each; thirty-five current United States of America Treasury bonds of the denomination of one hundred dollars, of the value of one hundred dollars each; seven current United States of America Treasury bonds of the denomination of five hundred dollars, of the value of five hundred dollars each; three current United States of America Treasury bonds of the denomination of one thousand dollars, of the value of one thousand dollars each; sundry current bonds, commonly called four-per-cent. bonds, issued by the Treasury of the United States of America, of diverse denominations, the denominations being to the said jurors unknown, of the amount and value in all of five thousand dollars; one hundred current United States of America Treasury notes of the denomination of one hundred dollars, of the value of one hundred dollars each; two hundred United States of America Treasury notes of the denomination of fifty dollars, of the value of fifty dollars each; one hundred current United States of America Treasury notes of the denomination of twenty dollars, of the value of twenty dollars each; one hundred current United States of America Treasury notes of the denomination of ten dollars, of the value of ten dollars each; one hundred current United
States of America Treasury notes of the denomination of five
4 dollars, of the value of five dollars each; two hundred
current United States of America Treasury notes of the denomination of two dollars, of the value of two dollars each; sundry current bank bills commonly called national currency, issued by certain national banks, the banks of issue being to the said jurors unknown, of diverse denominations, the denominations being to the said jurors unknown, of the amount and value in all of twenty thousand dollars; sundry current bank bills, commonly called greenbacks, issued by the Treasury of the United States of America, of diverse denominations, the denominations being to the said jurors unknown, of the amount and value in all of twenty thousand dollars; five hundred pieces of silver, current coin of the United States of America, called one dollar, of the value of one dollar each; five hundred pieces of silver, current coin of the United States of America, called half dollars, of the value of fifty cents each; five hundred pieces of silver, current coin of the United States of America, called

quarter dollars, of the value of twenty-five cents each; five hundred pieces of silver, current coin of the United States of America, called one dime, of the value of ten cents each; five hundred pieces of silver, current coin of the United States of America, called half dime, of the value of five cents each; five hundred pieces of nickle, current coin of the United States of America, called five cents, of the value of five cents each; one hundred pieces of gold, current coin of the United States of America, called twenty dollars, of the value of twenty dollars each; one hundred pieces of gold, current coin of the United States of America, called ten dollars, of the value of
5 ten dollars each; one hundred pieces of gold, current coin of
the United States of America, called five dollars, of the value of five dollars each; one hundred pieces of gold, current coin of the United States of America, called two dollars and fifty cents, of the value of two dollars and fifty cents each; one hundred pieces of gold, current coin of the United States of America, called one dollar, of the value of one dollar each—the personal goods, funds, money, and property of David Preston, Samuel A. Kean, and Elisha Gray, a copartnership as aforesaid, then and there found intrusted to the said Frederick Kerr, otherwise called Alfred Perrott, otherwise called Warren Start, by the said David Preston, Samuel A. Kean, and Elisha Gray, a copartnership as aforesaid, for safe keeping; the said Frederick Kerr, otherwise called Alfred Perrott, otherwise called Warren Start, did then and there fraudulently and feloniously convert to his, the said Frederick Kerr, otherwise called Alfred Perrott, otherwise called Warren Start's, own use, with intent feloniously to steal, take, and carry away the same, whereby and by force of the statute in such case made and provided the said Frederick Kerr, otherwise called Alfred Perrott, otherwise called Warren Start, is deemed to have committed the crime of larceny, and so the jurors aforesaid upon their oaths aforesaid do say that the said Frederick Kerr, otherwise called Alfred Perrott, otherwise called Warren Start, then and there, in manner and form aforesaid, the said personal goods, funds, money, and property of the said David Preston, Samuel A. Kean, and Elisha Gray, a copartnership as aforesaid, from the said David Preston, Samuel A. Kean, & Elisha Gray, a copartnership as aforesaid, did feloniously steal, take, and carry away, contrary to the stat-
6 ute and against the peace and dignity of the same people of
the State of Illinois.

The grand jurors aforesaid, chosen, selected, and sworn in and for the county of Cook, in the State of Illinois, in the name and by the authority of the people of the State of Illinois, upon their oaths aforesaid, do further present that Frederick Kerr, otherwise called Alfred Perrott, otherwise called Warren Start, late of the county of Cook, on the first day of February, in the year of our Lord one thousand eight hundred and eighty-three, in said county of Cook, in the State of Illinois aforesaid, then and there being a clerk in the employ of one David Preston, one Samuel A. Kean, and one Elisha Gray, then and there being a copartnership under the name and style of Preston, Kean and Company, fraudulently and feloniously did without then and there having the consent of the said David

Preston, Samuel A. Kean, and Elisha Gray, a copartnership as aforesaid, embezzle and fraudulently convert to his own use a large amount of personal goods, funds, money, and property, to wit: Seventy current United States of America Treasury bonds of the denomination of fifty dollars, of the value of fifty dollars each; thirty-five current United States of America Treasury bonds of the denomination of one hundred dollars, of the value of one hundred dollars each; seven current United States of America Treasury bonds of the denomination of five hundred dollars, of the value of five hundred dollars each; three current United States of America Treasury bonds of the denomination of one thousand dollars, of the value one thousand dollars each; sundry current bonds commonly called four per cent bonds, issued by the Treasury of the United States of America, of diverse denominations, the de-
7 nominations being to the said jurors unknown, of the amount and value in all of thirty-five thousand dollars.

One hundred current United States of America Treasury notes of the denomination of one hundred dollars, of the value of one hundred dollars each; two hundred current United States of America Treasury notes of the denomination of fifty dollars, of the value of fifty dollars each; one hundred current United States of America Treasury notes of the denomination of twenty dollars, of the value of twenty dollars each; one hundred current United States of America Treasury notes of the denomination of ten dollars, of the value of ten dollars each; one hundred current United States of America Treasury notes of the denomination of five dollars, of the value of five dollars each; two hundred current United States of America Treasury notes of the denomination of two dollars, of the value of two dollars each; sundry current bank bills commonly called national currency, issued by certain national banks, the banks of issue being to the said jurors unknown, of diverse denominations, the denominations being to the said jurors unknown, of the amount and value in all of twenty thousand dollars; sundry current bank bills commonly called greenbacks, issued by the Treasury of the United States of America, of diverse denominations, the denominations being to the said jurors unknown, of the amount and value in all of twenty thousand dollars; five hundred pieces of silver, current coin of the United States of America, called one dollar, of the value of one dollar each; five hundred pieces of silver, current coin of the United States of America, called half dollar, of the value of fifty cents each; five hundred pieces of silver, current coin of the
8 United States of America, called quarter-dollar, of the value of twenty-five cents each; five hundred pieces of silver, current coin of the United States of America, called one dime, of the value of ten cents each; five hundred pieces of silver, current coin of the United States of America, called half-dime, of the value of five cents each; five hundred pieces of nickel, current coin of the United States of America, called five cents, of the value of five cents each; one hundred pieces of gold, current coin of the United States of America, called twenty dollars, of the value of twenty-dollars each; one hundred pieces of gold, current coin of the United States

of America, called ten dollars, of the value of ten dollars each; one hundred pieces of gold, current coin of the United States of America, called five dollars, of the value of five dollars each; one hundred pieces of gold, current coin of the United States of America, called two dollars and fifty cents, of the value of two dollars and fifty cents each; one hundred pieces of gold, current coin of the United States of America, called one dollar, of the value of one dollar each—the personal goods, funds, money, and property of David Preston, Samuel A. Kean, and Elisha Gray, a copartnership as aforesaid, which said personal goods, funds, money, and property then and there came to the possession of the said Frederick Kerr, otherwise called Alfred Perrott, otherwise called Warren Start, by virtue of such employment, whereby, and by force of the statute in such case made and provided, the said Frederick Kerr, otherwise called Alfred
9 Perrott, otherwise called Warren Start, is deemed to have
committed the crime of larceny, and so the jurors aforesaid, upon their oaths aforesaid, do say that the said Frederick Kerr, otherwise called Alfred Perrott, otherwise called Warren Start, then and there, in manner and form aforesaid, the said personal goods, funds, money, and property of the said David Preston, Samuel A. Kean, and Elisha Gray, a copartnership as aforesaid, from the said David Preston, Samuel A. Kean, and Elisha Gray, a copartnership as aforesaid, then and there being found, did then and there feloniously steal, take, and carry away, contrary to the statute and against the peace and dignity of the same people of the State of Illinois.

The grand jurors aforesaid, chosen, selected, and sworn in and for the county of Cook, in the State of Illinois, in the name and by the authority of the people of the State of Illinois, upon their oaths aforesaid do further present that Frederick Kerr, otherwise called Alfred Perrott, otherwise called Warren Start, late of the county of Cook, on the first day of February, in the year of our Lord one thousand eight hundred and eighty-three, in said county of Cook, in the State of Illinois aforesaid, — seventy current United States of America Treasury bonds of the denomination of fifty dollars, of the value of fifty dollars each; thirty-five current United States of America Treasury bonds of the denomination of one hundred dollars, of the value of one hundred dollars each; seven current United States of America Treasury bonds of the denomination of five hundred dollars, of the value of five hundred dollars each; three current United States of America Treasury bonds of the denomination of one thousand dollars, of the value of one thousand dollars each; sundry current bonds commonly called four-per-cent. bonds, issued by
10 the Treasury of the United States of America, of diverse de-
nominations, the denominations being to the said jurors unknown, of the amount and value of thirty-five thousand dollars; one hundred current United States of America Treasury notes of the denomination of one hundred dollars, of the value of one hundred dollars each; two hundred current United States of America Treasury notes of the denomination of fifty dollars, of the value of fifty dollars each; one hundred current United States of America Treasury notes of the denomination of twenty dollars, of the value

of twenty dollars each; one hundred current United States of America Treasury notes of the denomination of ten dollars, of the value of ten dollars each; one hundred current United States of America Treasury notes of the denomination of five dollars, of the value of five dollars each; two hundred current United States of America Treasury notes of the denomination of two dollars, of the value of two dollars each; sundry current bank bills, commonly called national currency, issued by certain national banks, the banks of issue being to the said jurors unknown, of diverse denominations, the denominations being to the said jurors unknown, of the amount and value in all of twenty thousand dollars; sundry current bank bills, commonly called greenbacks, issued by the Treasury of the United States of America, of diverse denominations, the denominations being to the said jurors unknown, of the amount and value in all of twenty thousand dollars; five hundred pieces of silver, current coin of the United States of America, called one dollar, of the value of one dollar each; five hundred pieces of silver, current coin
11 of the United States of America, called half dollar, of the value of fifty cents each; five hundred pieces of silver, current coin of the United States of America, called quarter dollar, of the value of twenty-five cents each; five hundred pieces of silver, current coin of the United States of America, called one dime, of the value of ten cents each; five hundred pieces of silver, current coin of the United States of America, called half dimes, of the value of five cents each; five hundred pieces of nickel, current coin of the United States of America, called five cents, of the value of five cents each; one hundred pieces of gold, current coin of the United States of America, called twenty dollars, of the value of twenty dollars each; one hundred pieces of gold, current coin of the United States of America, called ten dollars, of the value of ten dollars each; one hundred pieces of gold, current coin of the United States of America, called five dollars, of the value of five dollars each; one hundred pieces of gold, current coin of the United States of America, called two dollars and fifty cents, of the value of two dollars and fifty cents each; one hundred pieces of gold, current coin of the United States of America, called one dollar, of the value of one dollar each—the personal goods, money, and property of David Preston, Samuel A. Kean, and Elisha Gray, then and there being found, did then and there feloniously steal, take, and carry away, contrary to the statute, and against the peace and dignity of the same people of the State of Illinois.

The grand jurors aforesaid chosen, selected, and sworn in and for the county of Cook, in the State of Illinois, in the name and
12 by the authority of the people of the State of Illinois, upon their oaths aforesaid do further present that Frederick Kerr, otherwise called Alfred Perrott, otherwise called Warren Start, late of the county of Cook, on the first day of February, in the year of our Lord one thousand eight hundred and eighty-three, in said county of Cook, in the State of Illinois aforesaid, feloniously, unlawfully, and unjustly, for his own gain and to prevent the owners from again possessing their money and property, did buy, receive, and

aid in concealing one hundred current United States of America Treasury notes of the denomination of one hundred dollars, of the value of one hundred dollars each; two hundred current United States of America Treasury notes of the denomination of fifty dollars, of the value of fifty dollars each; one hundred current United States of America Treasury notes of the denomination of twenty dollars, of the value of twenty dollars each; one hundred current United States of America Treasury notes of the denomination of ten dollars, of the value of ten dollars each; one hundred current United States of America Treasury notes of the denomination of five dollars, of the value of five dollars each; two hundred current United States of America Treasury notes of the denomination of two dollars, of the value of two dollars each; sundry current bank bills, commonly called national currency, issued by certain national banks, the banks of issue being to the said jurors unknown, of diverse denominations, the denominations being to the said jurors unknown, of the amount and value in all of twenty thousand dollars; sundry current bank bills, commonly called greenbacks, issued by the Treasury of the United States of America, of diverse denominations, the 13 denominations being to the said jurors unknown, of the amount and value in all of twenty thousand dollars; five hundred pieces of silver, current coin of the United States of America, called one dollar, of the value of one dollar each; five hundred pieces of silver, current coin of the United States of America, called half dollar, of the value of fifty cents each; five hundred pieces of silver, current coin of the United States of America, called quarter dollar, of the value of twenty-five cents each; five hundred pieces of silver, current coin of the United States of America, called one dime, of the value of ten cents each; five hundred pieces of silver, current coin of the United States of America, called half dime, of the value of five cents each; five hundred pieces of nickel, current coin of the United States of America, called five cents, of the value of five cents each; one hundred pieces of gold, current coin of the United States of America, called twenty dollars, of the value of twenty dollars each; one hundred pieces of gold, current coin of the United States of America, called ten dollars, of the value of ten dollars each; one hundred pieces of gold, current coin of the United States of America, called five dollars, of the value of five dollars each; one hundred pieces of gold, current coin of the United States of America, called two dollars and fifty cents, of the value of two dollars and fifty cents each; one hundred pieces of gold, current coin of the United States of America, called one dollar, of the value of one dollar each; seventy current United States of America Treasury bonds of the denomination of fifty dollars, of the value of fifty dollars each; thirty-five current United States of America Treasury bonds of the 14 denomination of one hundred dollars, of the value of one hundred dollars each; seven current United States of America Treasury bonds of the denomination of five hundred dollars, of the value of five hundred dollars each; three current United States of America Treasury bonds of the denomination of one thousand dollars, of the value of one thousand dollars each; sundry current bonds, commonly called four-per-cent. bonds, issued by the Treasury of the United States of America, of diverse denominations, the denominations being to the said jurors unknown, of the amount and value in all of thirty-five thousand dollars, of the goods, money, property, and chattels, of David Preston, Samuel A. Kean, and Elisha Gray, then lately before feloniously stolen, taken and carried away from the said David Preston, Samuel A. Kean, and Elisha Gray, by certain evil-disposed person or persons, the said Frederick Kerr, otherwise called Alfred Perrott, otherwise called, Warren Start, then and there well knowing the said goods, money and property to have been feloniously stolen, taken and carried away coutrary to the statute and against the peace and dignity of the same people of the State of Illinois.

LUTHER LAFLIN MILLS,
State's Attorney.

Endorsements: Term No. 999, P. G. D. No. 14437. Criminal court of Cook county, February term, 1883. The People of the State of Illinois *vs.* Frederick Kerr [*et*] *al.*, etc. Indictment for larceny, etc. A true bill. Sam'l B. Chase, foreman of the grand jury. Witnesses David Preston, Samuel A. Kean, Elisha Gray, W. A. Pinkerton. Filed Feb'y 24, 1883. John Stephens, clerk.

15 UNITED STATES OF AMERICA.

STATE OF ILLINOIS, } *ss:*
Cook County, }

Pleas before a branch of the criminal court of Cook county, in said county and State, at a term thereof begun and held at the criminal court-house, in the city of Chicago, in said county, on the first Monday (being the third day) of September, in the year of our Lord one thousand eight hundred and eighty-three, and of the Independence of the United States the one hundred and eighth.

Present: Honorable Sidney Smith, judge of the superior court of Cook county, *ex-officio* judge of the criminal court of Cook county; Luther Laflin Mills, State's attorney; Seth F. Hanchett, sheriff of Cook county.

Attest: JOHN STEPHENS, *Clerk.*

* * * * * * *

And afterwards, to wit, on the twenty-sixth day of September, A. D. 1883, it being the term of court last aforesaid, the following among other proceedings were had and entered of record in said court, which said proceedings are in the words and figures following, to wit:

Indictment for Larceny, etc.

THE PEOPLE OF THE STATE OF ILLINOIS }
vs. } 14437.
FREDERICK KERR, *alias* ALFRED PERROTT, *alias* WARREN START. }

This day come the said People, by Luther Laflin Mills, State's attorney, and the defendant in his own proper person in the custody

of the sheriff also comes, and the State's attorney now says
16 that he is ready to proceed with the trial of this cause and moves the court the trial proceed forthwith, whereupon the said defendant objects to a trial at this term, protesting that the court has not jurisdiction and that this cause ought not be tried until the determination of the writ of error in a certain *habeas corpus* proceeding, wherein he, the said defendant, is the petitioner.

Thereupon it is ordered by the court that this cause be, and the same is hereby, continued until the next term of this court, and that the said defendant be remanded into the custody of the sheriff of Cook county.

* * * * * * *

UNITED STATES OF AMERICA.

STATE OF ILLINOIS, } ss:
Cook County, }

Pleas before a branch of the criminal court of Cook county, in said county and State, at a term thereof begun and held at the criminal court-house, in the city of Chicago, in said county, on the first Monday (being the first day) of October, in the year of our Lord one thousand eight hundred and eighty-three, and of the Independence of the United States the one hundred and eighth.

Present: Honorable Joseph E. Gary, judge of the superior court of Cook county, *ex-officio* judge of the criminal court of Cook county; Luther Laflin Mills, State's attorney; Seth F. Hanchett, sheriff of Cook county.

Attest: JOHN STEPHENS, *Clerk.*

And afterwards, to wit, on the sixteenth day of October, A. D. 1883, it being the term of court last aforesaid, the following
17 among other proceedings were had and entered of record in said court, which said proceedings are in the words and figures following, to wit:

Indictment for Larceny, etc.

THE PEOPLE OF THE STATE OF ILLINOIS
vs.
FREDERICK KERR, *alias* ALFRED PERROTT, *alias* WARREN START. } 14437.

This day come the said People, by Luther Laflin Mills, State's attorney, and the said defendant, as well in his own proper person as by his counsel, also comes, and he having been furnished with a copy of the indictment in this cause and lists of the names of the witnesses and jurors, and he being now here duly arraigned and forthwith demanded of and concerning the crime alleged against him in said indictment how he will acquit himself thereof, for a plea in that behalf the said defendant now here files his plea to the jurisdiction of the court.

Thereupon it is ordered that the said defendant be remanded into the custody of the sheriff of Cook county.

The plea to the jurisdiction of the court referred to in the foregoing order is in the words and figures following, to wit:

Indictment for Larceny and Embezzlement and Receiving, etc., Stolen Property.

STATE OF ILLINOIS, } *ss:*
County of Cook, }

In the Criminal Court Thereof. February Term, 1883.

THE PEOPLE OF THE STATE OF ILLINOIS
vs.
FREDERICK M. KERR, *alias* ALFRED PERROTT, *alias* WARREN START.

18 And the said Frederick M. Ker, in his own proper person, cometh into court here, and, having heard the said indictment read, says that the said court here ought not to take cognizance of the crime in the said indictment above specified, because protesting that he is not guilty of the same; nevertheless the said Frederick M. Ker says that this defendant is now, and has always been from his birth hitherto, a citizen of the province of Ontario, in the Dominion of Canada, and a subject of her Britanic Majesty Victoria, Queen of Great Britain and Ireland and Empress of India, and this defendant further avers that this defendant was not found and arrested in said Cook county upon the indictment aforesaid; and this defendant avers that the jurisdiction of this court, upon the indictment over the person of this defendant aforesaid, was and is procured and continued in violation of the terms of a treaty of the United States, and in violation of law, and was and is unlawful restraint of this defendant's liberty. And defendant further avers that upon the complaint of David Preston, Samuel A. Kean, and Elisha Gray, who were at that time partners in the banking business in said Cook county under the firm name of Preston, Kean & Co., the grand jury of said Cook county, on the 24th day of February, 1883, presented and returned into said criminal court of Cook county two indictments against this defendant, in one of which this defendant is charged with the crime of embezzlement and the crime of larceny and the crime of receiving *and* stolen property of and belonging to said David Preston *et al.*; and in the other said indictment this defendant was and is charged with the crime of forgery to
19 the prejudice of said David Preston *et al.*, which said first indictment above mentioned was and is the indictment in this cause. This defendant further avers that on the 26th day of February, 1883, the Honorable John M. Hamilton, Governor of said State of Illinois, requested in writing, under his hand and the seal of State of said State of Illinois, of the Secretary of State of the United States, that a warrant and extradition application issue from the Federal Executive to the Executive of the Republic of Peru for the extradition of this defendant from said Republic of Peru to said Cook county to stand trial upon the indictments aforesaid.

This defendant further avers that true copies of both of said indictments were annexed to said request of said Hamilton and made a part thereof, and that the said Hamilton, in and by said request, prayed that said warrant of the Federal Executive be issued to one Henry G. Julien as messenger, to receive this defendant from the executive authorities of Peru, and bring this defendant to said Cook county for the purpose of placing this defendant upon trial as aforesaid; that on the first day of March, A. D. 1883, the President of the United States issued his warrant in due form of law, pursuant to the request of the Governor of Illinois as aforesaid, directed to said Henry G. Julian as messenger to receive this defendant from the authorities of the Republic of Peru upon a charge of larceny, in compliance with existing treaty stipulations between the United States of America and Peru, as is in and by said warrant recited. And this defendant avers that on the said first day of March, 1883, the Secretary of State of the United
States, under his hand in writing, requested of James R.
20 Partridge, Esq., acting consul of the United States at Lima,
in Peru, that said Partridge procure the executive authorities of the Peruvian government to surrender this defendant to said Henry G. Julien under the treaty between said government of Peru and the Government of the United States of September 12, 1870, which was the only treaty then and now in force between the United States and said Republic of Peru; that no request was at any time presented by said Partridge or Julien, or any other person, on behalf of the United States, to any of the authorities or diplomatic agents of said Republic of Peru, and that none of the authorities of said Republic of Peru, or any of the diplomatic agents thereof, ever at any time gave or granted any consent or authority to said Henry G. Julien, or any other person, to arrest or imprison or remove this defendant in or from Peru for any cause or purpose whatever. And this defendant avers that on the 3rd day of April, A. D. 1883, this defendant was, and had been continuously for several weeks before said last-mentioned day, domiciled in the city of Lima, at and within the said Republic of Peru, and that on the day last aforesaid Henry G. Julien, without any warrant or authority whatsoever from the government of Peru, or any officer or diplomatic agent thereof, forcibly assaulted, arrested, and imprisoned this defendant, and the said Henry G. Julien, and diverse other persons unknown to this defendant by name, none of whom were officers or diplomatic agents of the said Republic of Peru, forced this defendant immediately to go under the unlawful arrest aforesaid to Callao, a city in said Peru,
and said Henry G. Julien, then and there immediately, forci-
21 bly placed this defendant upon the United States ship "Essex,"
where said Julien forcibly kept and detained this defendant a close prisoner, by virtue of a pretended right under said President's warrant and against the protest of this defendant, until the 10th day of May, 1883, when said United States ship "Essex" proceeded on her course to Honolulu, in the Sandwich Islands, removing this defendant, so in custody of said Julien, to Honolulu, where said ship "Essex" arrived on the 18th day of June, 1883; and said

Julien and the naval officers of said ship "Essex" refused to allow this defendant to land at Callao or at Honolulu, or to claim the protection of his Government, or to be brought before any court where the legality of his said arrest and detention could be inquired into, although this defendant then and there demanded that such privileges should be accorded to him, and said Julien and the naval officers of the said ship "Essex" kept this defendant confined on said ship "Essex" until the 2nd day of July, 1883, and forcibly compelled this defendant, against the will and protest of this defendant, on the day last aforesaid, to go from the said "Essex" directly on board of another vessel, to wit, "The City of Sidney," then in the harbor at Honolulu, and bound from Honolulu aforesaid to San Francisco, in the State of California. This defendant avers that on the 18th day of June, 1883, said Samuel A Kean, upon his oath, caused to be presented to the Honorable John M. Hamilton, Governor of the State of Illinois, a sworn statement of said Kean's, in writing, in and by which said Kean represented to said Governor that this defendant had been indicted in the said criminal court
of Cook county for the crimes of embezzlement and
22 larceny and receiving of stolen property of and belonging to
said David Preston, Samuel A. Kean and Elisha Gray, partners as aforesaid, and further representing therein to said Hamilton that this defendant was a fugitive from justice from said State of Illinois and that this defendant was about to arrive in the State of California, and praying for a requisition upon the Governor of said State of California for the arrest of this defendant, and asking that one Frank Warner be appointed messenger in the premises to bring this defendant from said State of California to said Cook county. And the defendant avers that on the said 18th day of June, 1883, the Governor of the State of Illinois, pursuant to said statement of said Kean, issued his requisition upon the Governor of the State of California for the arrest of this defendant upon a charge of larceny, appointing said Frank Warner as messenger to receive this defendant from the said State of California and bring this defendant to said Cook county. And this defendant further avers that the said indictment was not certified to by the Governor of the State of Illinois, as required by law. And this defendant avers that on the 25th day of June, 1883, the Governor of the State of California issued his warrant, pursuant to said last-mentioned requisition, commanding the arrest of this defendant, wherever found in said State of California, and the delivery of this defendant to said Frank Warner. And this defendant avers that on the 9th day of July, 1883, the said ship "City of Sidney" arrived at the port of San Francisco with this defendant on board thereof, so as aforesaid in the custody of the
23 said Julien, and said ship was boarded in the harbor and
before landing by said Frank Warner and other persons, to this defendant unknown by name, and said Warner and Julien and others took this defendant from said ship "City of Sidney" to a hotel in San Francisco, where the said warrant of the Governor of California was served upon this defendant, and said Julien and Warner refused to allow this defendant to consult any counsel or

take any proceedings to have the legality of his said imprisonment inquired into, although this defendant then and there demanded such right, and this defendant was kept at said hotel against this defendant's protest and consent, detained by said Warner and Julien from said day until on the 10th day of July, 1883, when said Warner and said Julien started with this defendant in custody, by rail, for the city of Chicago, in said Cook county, and on the 16th day of July, 1883, this defendant was delivered by the said Warner to the keeper of the common jail of said Cook county, to be there held and detained under two certain writs of capias issued before that time upon the two indictments aforesaid, and that this defendant has since said time remained, and is now, in the custody of the sheriff of Cook county aforesaid upon the writs of capais aforesaid.

This defendant further avers that at the time of the making by said Kean of his said application for said last-mentioned requisition, and at the time the said last-mentioned requisition was issued by said Governor of Illinois upon said Governor of California, on the 18th day of June, 1883, aforesaid, and at the time the Governor of California issued his said warrant of date the 25th day of June, aforesaid, this defendant was not a fugitive from justice in
24 said State of California, and that this defendant had not, at any time prior to his said arrest, fled to or been found in said State of California; that this defendant was brought into said State of California by said Julien under said unlawful arrest and duress on the 9th day of July, 1883, against this defendant's consent and protest, before which said last-mentioned day this defendant had never, at any time, been in said State of California, all of which Samuel A. Kean well knew when said Kean made said statement. And defendant avers that the said extradition proceedings last aforesaid were and are wholly and utterly void for the reasons aforesaid.

And this defendant avers that at all times after the said arrest of this defendant at Lima aforesaid, for during, and until the delivery of this defendant to said sheriff of Cook county, this defendant was under the close custody and surveillance of said Henry G. Julien; that said Julien, for and during all the time aforesaid, refused and denied this defendant the right or privilege of addressing or counselling with any attorney-at-law or any civil magistrate or law office or British consular officer, although often by this defendant requested, while this defendant was so under arrest at Lima and Callao, in Peru, and at Honolulu and at San Francisco.

And said Julien took from this defendant all of defendant's money and property for the purpose, as said Julien declared to this defendant, of preventing this defendant from making any defense against or escape from arrest and duress.

And defendant avers that said Henry G. Julien has never, since this defendant's said arrest in Peru, made any return of the
25 said President's warrant to the Department of State, or to any other department of the Government.

Wherefore this defendant avers that said criminal court of Cook county has not now, and never has heretofore had, any lawful jurisdiction of the person of this defendant upon the indictment aforesaid, and this the said Frederick M. Ker is ready to verify; wherefore he prays judgment if the said court now here will or ought to take cognizance of the indictment aforesaid, and that by the court here he may be dismissed or discharged.

FREDERICK M. KER.

ROBERT HERVEY AND
C. STUART BEATTIE,
Att'ys for Frederick M. Ker.

And afterwards, to wit, on the 19th day of October, A. D. 1883, the State's attorney filed in said court the People's demurrer to the defendant's plea to jurisdiction, which said demurrer is in the words and figures following, to wit:

Indictment for Larceny, etc.

STATE OF ILLINOIS, } ss:
County of Cook, }

In the Criminal Court of Cook County.

THE PEOPLE OF THE STATE OF ILLINOIS *vs.* FREDERICK KERR.

And the said plaintiff, The People of the State of Illinois, say that the said plea of the defendant and the matters therein contained, in manner and form as the same are above pleaded, are not sufficient in law to deprive this court of its jurisdiction to try said defendant upon the indictment aforesaid, and that the plaintiff, The People of the State of Illinois, are not bound by law to answer the same, and this the plaintiff is ready to verify; wherefore, for want of a sufficient plea in this behalf, the plaintiff, The People of the State of Illinois, pray that the defendant may further plead to said indictment. 26

LUTHER LAFLIN MILLS,
State's Attorney.

And afterwards, to wit, on the twenty-seventh day of October, A. D. 1883, it being the term of court last aforesaid, the following among other proceedings were had and entered of record in said court, which said proceedings are in the words and figures following, to wit:

Indictment for Larceny, etc.

THE PEOPLE OF THE STATE OF ILLINOIS
vs.
FREDERICK KERR, *alias* ALFRED PERROTT, *alias* WARREN START.
} No. 14437.

This day come the said People, by Luther Laflin Mills, State's attorney, and the said defendant, as well in his own proper person as by Messrs. Robert Hervey and C. Stuart Beattie, his counsel, also comes, and this cause now coming on to be heard upon the demurrer of the said People to the defendant's plea to the jurisdiction of the court on file herein, and the court hearing counsel in support of said demurrer as well as in opposition thereto, and being now fully advised in the premises, doth sustain said demurrer, and orders that said demurrer be, and the same is hereby, sustained accordingly; and the court doth further order that the said defendant pleads further to the indictment in this cause. 27

And a further plea being now here forthwith demanded of and from the said defendant, and he refusing to plead further to the indictment herein, the court orders that a plea of not guilty be entered for the said defendant.

And now, on motion of said defendant's counsel, it is ordered that this cause be, and the same is hereby, continued until the next term of this court.

Thereupon it is ordered that the said defendant be remanded into the custody of the sheriff of Cook county.

UNITED STATES OF AMERICA,
State of Illinois, Cook County, } *ss:*

Pleas before a branch of the criminal court of Cook county, in said county and State, at a term thereof begun and held at the criminal court-house, in the city of Chicago, in said county, on the first Monday (being the fifth day) of November, in the year of our Lord one thousand eight hundred and eighty-three, and of the Independence of the United States the one hundredth and eighth.

Present: Honorable Joseph E. Gary, judge of the superior court of Cook county, *ex-officio* judge of the criminal court of Cook county; Luther Laflin Mills, State's attorney; Seth F. Hanchett, sheriff of Cook county.

Attest: JOHN STEPHENS, *Clerk.*

* * * * * * *

28 And afterwards, to wit, on the fifteenth day of November, A. D. 1883, it being the term of court last aforesaid, the following among other proceedings were had and entered of record in said court, which said proceedings are in the words and figures following, to wit:

Indictment for Larceny, etc.

THE PEOPLE OF THE STATE OF ILLINOIS
vs.
FREDERICK KERR, *alias* ALFRED PERROTT, *alias* WARREN START. } 14437.

This day come the said People, by Luther Laflin Mills, State's attorney, and the said defendant, as well in his own proper person as by his counsel, also comes, and now, issue being joined, it is ordered that a jury come and counsel proceed to select a jury to try this cause, and C. E. Crittenden, Christopher Kruse, Frederick Aldrich, Wallace Wright, William Baumeyer, Albert Marlett, Joseph Pasco, M. Brennan, and C. Hayden having been selected and sworn as

jurors and the regular panel of jurors being now exhausted, it is, on motion of Luther Laflin Mills, State's attorney, ordered by the court that a special venire issue out of this court commanding the sheriff of Cook county to summon twenty-five good and lawful men from the body of Cook county to appear before this court forthwith and from whom to fill the panel of the jury for the trial of this cause; and the sheriff having returned said venire counsel proceed with the further selection of a jury, and D. F. Dearborn, L. H. Little, and Charles Manny being selected and sworn as jurors, and the panel of jurors for the trial of this cause being now filled and the aforesaid jury hearing testimony of witnesses and the hour of adjourn-
29 ment having arrived, it is ordered that the further consideration of this cause be, and the same is hereby, postponed until the coming in and opening of this court at ten o'clock to-morrow morning, and that in the meantime the jury aforesaid remain in the custody of two sworn officers of this court, to be by them kept together and returned into court at the coming in and opening thereof at the hour last aforesaid.

Thereupon it is ordered that the said defendant be remanded into the custody of the sheriff of Cook county.

And afterwards, to wit, on the sixteenth day of November, A. D. 1883, it being the term of court last aforesaid, the following among other proceedings were had and entered of record in said court, which said proceedings are in the words and figures following, to wit:

Indictment for Larceny, etc.

THE PEOPLE OF THE STATE OF ILLINOIS
vs.
FREDERICK KERR, *alias* ALFRED PERROTT, *alias* WARREN START. } 14437.

This day again come the said People, by Luther Laflin Mills, State's attorney, and the said defendant, as well in his own proper person as by his counsel, also comes, and also come the jurors of the jury aforesaid, and the aforesaid jury hearing further testimony of witnesses, and the hour of adjournment having arrived, it is ordered that the further consideration of this cause be, and the same is hereby, postponed until the coming in and opening of this court, at ten o'clock to-morrow morning, and that in the meantime the jury aforesaid remain in the custody of two sworn officers of this court, to be by them kept together and returned into court at the coming in and opening thereof, at the hour last aforesaid.

30 Thereupon it is ordered that the said defendant be remanded into the custody of the sheriff of Cook county.

And afterwards, to wit, on the seventeenth day of November, A. D. 1883, it being the term of court last aforesaid, the following among other proceedings were had and entered of record in said court, which said proceedings are in the words and figures following, to wit:

Indictment for Larceny, etc.

THE PEOPLE OF THE STATE OF ILLINOIS
vs.
FREDERICK KERR, *alias* ALFRED PERROTT, *alias* WARREN START. } 14437.

This day again come the said People, by Luther Laflin Mills, State's attorney, and the said defendant, as well in his own proper person as by his counsel, also comes, and also come the jurors of the jury aforesaid, and the aforesaid jury, hearing the further testimony of witnesses, arguments of counsel, and instructions of the court, retire, in charge of two sworn officers, to consider of their verdict, and afterwards return into court and for verdict say: We, the jury, find the defendant guilty, in manner and form as charged in the indictment, of embezzling forty-four thousand seven hundred dollars ($44,700.00) from the banking firm of Preston, Kean and Co., of the city of Chicago, and sentence him to ten years' imprisonment in the Illinois State Penitentiary, at Joliet.

And now comes the said defendant by his counsel and moves the court for a new trial in this cause.

Thereupon it is ordered that the said defendant be remanded into the custody of the sheriff of Cook county.

31 UNITED STATES OF AMERICA,
State of Illinois, Cook County, } *ss:*

Pleas before a branch of the criminal court of Cook county, in said county and State, at a term thereof begun and held at the criminal court-house, in the city of Chicago, in said county, on the first Monday (being the third day) of December, in the year of our Lord one thousand eight hundred and eighty-three, and of the Independence of the United States the one hundred and eighth.

Present, Honorable Joseph E. Gary, judge of the superior court of Cook county, *ex-officio* judge of the criminal court of Cook county; Luther Laflin Mills, State's attorney; Seth F. Hanchett, sheriff of Cook county.

Attest: JOHN STEPHENS, *Clerk.*

And afterwards, to wit, on the fifth day of December, A. D. 1883, it being the term of court last aforesaid, the following among other proceedings were had and entered of record in said court, which said proceedings are in the words and figures following, to wit:

Indictment for Larceny, etc.

THE PEOPLE OF THE STATE OF ILLINOIS
vs.
FREDERICK KERR, *alias* ALFRED PERROTT, *alias* WARREN START. } 14437.

This day come the said People, by Luther Laflin Mills, State's attorney, and the said defendant, as well in his own proper person as by his counsel, also comes, and the court hearing counsel in

32 support of the motion for a new trial heretofore entered herein, as well as in opposition thereto, and being now fully advised in the premises, doth overrule said motion and orders that said motion for a new trial in this cause be, and the same is hereby, overruled accordingly; to which order of the court in overruling said motion the defendant, by his counsel now here, excepts, and on his motion five days are allowed him in which to prepare and file his bill of exceptions in this cause.

Indictment for Larceny, etc.

THE PEOPLE OF THE STATE OF ILLINOIS
vs.
FREDERICK KERR, *alias* ALFRED PERROTT, *alias* WARREN START. } 14437.

This day come the said People, by Luther Laflin Mills, State's attorney, and the said defendant, as well in his own proper person as by his counsel, also comes, and now neither the said defendant nor his counsel for him saying anything further why the judgment of the court should not now be pronounced against him on the verdict of guilty heretofore rendered to the indictment in this cause;

Therefore it is ordered and adjudged by the court that the said defendant, Frederick Kerr, *alias* Alfred Perrott, *alias* Warren Start, be taken from the bar of the court to the common jail of Cook county, from whence he came, and from thence by the sheriff of Cook county without delay to the penitentiary of this State, at Joliet, and be delivered to the warden or keeper of said penitentiary, and the said warden or keeper is hereby required and commanded to take the body of the said defendant, Frederick Kerr, *alias* Alfred Perrott, *alias* Warren Start, and confine him in said penitentiary in safe and secure custody for and during the term of ten years
33 from and after the delivery hereof at hard labor, and that he be thereafter discharged.

It is further ordered that the said defendant pay all the costs of these proceedings and that execution issue therefor.

(Bill of exceptions from page 67 to page 306, inclusive, omitted by order of counsel for plaintiff in error.)

STATE OF ILLINOIS, } *ss:*
County of Cook, }

I, John Stephens, clerk of the criminal court of Cook county, in said county and State, do hereby certify the above and foregoing to be a true, perfect, and complete copy of the record in a certain cause lately pending in said court, wherein The People of the State of Illinois were plaintiffs and Frederick Kerr, *alias* Alfred Perrott, *alias* Warren Start, defendant.

Witness John Stephens, clerk of said court, and the seal thereof, at Chicago, in said county, this thirty-first day of December, A. D. 1883.

[SEAL.] JOHN STEPHENS, *Clerk.*

STATE OF ILLINOIS, }
Northern Grand Division, } *ss:*

In the Supreme Court Thereof, of the March Term, A. D. 1884.

FREDERICK M. KER, Plaintiff in Error,

vs.

THE PEOPLE OF THE STATE OF ILLINOIS, Defendants in Error.

And now comes the said Frederick M. Ker, plaintiff in error herein, and says that in the record and proceedings of the court below error hath intervened to his prejudice, and plaintiff in error assigns hereon the following errors, to wit:

First. The court below erred in sustaining the demurrer of said People to said plaintiff in error's plea to the jurisdiction aforesaid.

Second. The court below erred in requiring a plea to the merits from plaintiff in error in manner and form as aforesaid.

Third. The court below erred in entering a plea of not guilty to said indictment for the plaintiff in error in manner and form aforesaid.

Fourth. The court below erred in overruling plaintiff in error's protest against a trial upon said indictment in manner and form aforesaid.

Fifth. The court below erred in taking cognizance of and trying plaintiff in error upon said indictment in manner and form aforesaid.

Sixth. The court below erred in overruling the motion of plaintiff in error to require the prosecution to elect on the trial of said cause upon a single act of alleged larceny or embezzlement by plaintiff in error upon which to ask for a verdict.

35 Seventh. The court below erred in submitting to the jury on the trial of said cause more than one alleged act of larceny or embezzlement by plaintiff in error against the objection of plaintiff in error.

Eighth. The court below erred in permitting parol evidence on the trial of said cause of the dissolution of the limited partnership of Preston, Kean and Company over the objection of plaintiff in error.

Ninth. The court below erred in overruling the motion of plaintiff in error to take the evidence in said cause from the jury on the trial thereof.

Tenth. The court below erred in admitting improper and incompetent evidence against plaintiff in error and over his objection on the trial of said cause.

Eleventh. The court below erred in modifying the 2nd, 3rd, and 5th instructions asked by plaintiff in error on the trial of said cause.

Twelfth. The court below erred in refusing the 7th instruction asked by plaintiff in error.

Thirteenth. The court below erred in giving improper and misleading instructions asked by the people on the trial of said cause.

Fourteenth. The court below erred in overruling the motion for a new trial in said cause.

Fifteenth. The court below erred in rendering judgment in manner and form aforesaid.

Sixteenth. The verdict and judgment below in manner and form aforesaid are without evidence to sustain them.

Seventeenth. The verdict and judgment below are against
36 the evidence.

Eighteenth. The verdict and judgment below are against the law.

C. STUART BEATTIE AND
ROBERT HERVEY,
Att'ys for Pl'ffs in Error.

Be it remembered that afterwards, to wit, on the 12th day of March, A. D. 1884, the same being one of the days of said term of court aforesaid, the following proceedings were by said court had and entered of record, to wit:

Error to Criminal Court, Cook County.

FREDERICK M. KERR
vs. } 989. 6, P. D.
THE PEOPLE OF THE STATE OF ILLINOIS.

Now on this day this cause comes on for hearing in the regular call of the docket, and it appearing to the court that said defendants in error have entered their appearance herein and that a duly certified transcript of the record and proceedings of the court below, together with printed abstracts thereof and briefs and argument of counsel in support of the errors assigned herein have been duly filed, as required by law and the rules of this court in that behalf made and provided, and that this cause is here submitted upon such transcript, abstracts, briefs, and arguments for the consideration and judgment of the court:

Therefore it is ordered by the court that this cause be, and the same is hereby, taken under advisement.

37 Be it remembered that afterwards, to wit, on the 19th day
of May, A. D. 1884, the same being in vacation after the term aforesaid, the following among other proceedings were, by said court, had and entered of record, to wit:

Error to Criminal Court, Cook County.

FREDERICK M. KERR
vs. } 989. 6, P. D.
THE PEOPLE OF THE STATE OF ILLINOIS.

On this day came again the said parties, and the court having diligently examined and inspected as well the record and proceedings aforesaid as the matters and things therein assigned for error, and being now sufficiently advised of and concerning the premises, for that it appears to the court now here that neither in the record and proceedings aforesaid nor in the rendition of the judgment aforesaid is there anything erroneous, vicious, or defective, and that that record is no error:

Therefore it is considered by the court that the judgment aforesaid be affirmed in all things and stand in full force and effect, notwithstanding the said matters and things therein assigned for error.

And it is further considered by the court that the said defendants in error recover of and from the said plaintiff in error their costs by them in this behalf expended, to be taxed, and that they have execution therefor.

38 At a supreme court begun and held at Ottawa on Tuesday, the second day of September, in the year of our Lord one thousand eight hundred and eighty-four, within and for the northern grand division of the State of Illinois.

Present: John Scholfield, chief justice; Pinkney H. Walker, justice; T. Lyle Dickey, justice; John M. Scott, justice; Benj. R. Sheldon, justice; John H. Mulkey, justice; Alfred M. Craig, justice; James McCartney, attorney general; William R. Milligan, sheriff; Everell F. Dutton, clerk.

Be it remembered, to wit, on the 8th day of September, A. D. 1884, the same being one of the days of said term of court, the following among other proceedings were, by said court, had and entered of record, to wit:

Error to Criminal Court of Cook County.

FREDERICK M. KERR
vs.
THE PEOPLE OF THE STATE OF ILLINOIS. } 989. 22 R. H.

Petition for rehearing.

Now on this day this cause coming on to be heard upon the petition of plaintiff in error for a rehearing herein, and the court being now duly advised in the premises, it is considered and ordered by the court that said petition for a rehearing be overruled and denied.

And it is further considered by the court that said petitioner pay the costs and charges herein taxed.

39 STATE OF ILLINOIS,
Northern Grand Division, } *ss:*

Supreme Court.

I, Alfred H. Taylor, clerk of the supreme court for the northern grand division of the State of Illinois, and keeper of the records and seal thereof, do hereby certify the above and foregoing to be a true copy of a certified transcript of the record and proceedings of the criminal court of Cook county (except such portions thereof as are omitted by direction of counsel for plaintiff in error), in a certain cause entitled, in this court, Frederick M. Kerr *vs.* The People of the State of Illinois, which said transcript aforesaid was filed in this office on the 13th day of February, A. D. 1884, together with the record and proceedings of said supreme court in the above-entitled cause of record in my said office.

Witness my hand and the seal of said supreme court, at Ottawa, in said State, this first day of October, A. D. 1885.

[Seal of the Supreme Court, State of Illinois. Aug. 23, 1818.]

A. H. TAYLOR, *Clerk.*

Fee for record, $25.00.

40 *Error to the Supreme Court of Illinois.*

United States of America, in the Supreme Court Thereof. October Term, 1885.

FREDERICK M. KER, Plaintiff in Error,

vs.

THE PEOPLE OF THE STATE OF ILLINOIS, Defendants in Error.

And now comes the said plaintiff in error and says that in the record and proceedings of the said supreme court of Illinois, in the cause aforesaid, error hath intervened to his prejudice, and he assigns hereon the follow[ing] errors, to wit:

First. That said supreme court of Illinois erred in affirming the judgment of said criminal court of Cook county, sustaining the demurrer to plaintiff in error's plea to the jurisdiction of said criminal court.

Second. That said supreme court of Illinois erred in *in* its judgment aforesaid in failing to enforce the full faith and credit of the Federal treaty with the Republic of Peru invoked by plaintiff in error in his said plea to the jurisdiction of said criminal court.

41 Third. The judgment of said supreme court of Illinois, in manner and form aforesaid, was and is in violation of the Constitution, treaty, and laws of the United States, to wit, in affirming the judgment of the said criminal court of Cook county, sustaining the demurrer to said plea to the jurisdiction thereof.

Wherefore plaintiff in error prays that a writ of error issue from this honorable court, and that the said judgment of said supreme court of Illinois be reversed; and plaintiff in error will ever pray, etc.

ROBERT HERVEY AND
STUART BEATTIE,
Attorneys for Plaintiff in Error.

ROB'T HERVEY (of Illinois),
Attorney & Counsel for Plaintiff in Error.

42 [Endorsed:] State of Illinois, supreme court, northern grand division. Frederick M. Kerr *vs.* The People of the State of Illinois. No. —.

43 STATE OF ILLINOIS:

Supreme Court, Northern Grand Division.

At a supreme court begun and held at Ottawa on Tuesday, the fourth day of March, in the year of our Lord one thousand eight hundred and eighty-four, within and for the northern grand division of the State of Illinois.

Present: Hon. Benj. R. Sheldon, chief justice; Pinkney H. Walker, justice; T. Lyle Dickey, justice; John M. Scott, justice; Jno. Scholfield, justice; John H. Mulkey, justice; Alfred M. Craig, justice; James McCartney, attorney general; W. R. Milligan, sheriff; Everell F. Dutton, clerk.

Be it remembered that afterwards, to wit, on the 19th day of May, A. D. 1884, the opinion of the court was filed in the clerk's office of said court, in words and figures following, to wit:

Error to Criminal Court of Cook County.

FREDERICK M. KER
vs.
THE PEOPLE OF THE STATE OF ILLINOIS. } No. 6, P. D.

Opinion by SCOTT, *J.*:

It appears from the record before this court that at the February
term, 1883, of the criminal court of Cook county the grand jury pre-
sented in open court an indictment against Frederick M. Kerr,
which contained four counts; in the first of which he is charged with
embezzlement as bailee, in the second with embezzlement as
44 a clerk, in the third with larceny as at common law, and in
the fourth with receiving stolen property. In the several
counts the money, funds, and securities alleged to have been embezzled and stolen are alleged to be the personal goods and property of David Preston, Samuel A. Kean, and Elisha Gray, a copartnership firm under the name of Preston, Kean & Co. On the 13th day of October, 1883, defendant, on being arraigned, filed a plea to the jurisdiction of the court over his person, the effect of which was to ask immunity from prosecution on the indictment then pending against him, for the reasons set forth in his plea. To that plea a general demurrer was sustained, and defendant was by the court required to plead over. Against the protest of defendant that he was entitled to immunity from prosecution for the offences alleged against him on the indictment on account of the matters set forth in his plea, and because he refused to plead over, the court entered a plea of not guilty for him. On the trial the jury found defendant guilty of embezzlement, as charged in the indictment, and fixed the term
of punishment at ten years in the penitentiary. A motion for a new
trial entered by defendant was overruled, and the court pro-
45 nounced judgment on the verdict, and defendant brings the
case to this court on error.

One ground of error relied on with much confidence, is the decision of the court sustaining the demurrer to defendant's plea, calling in question the right or jurisdiction of the court to proceed with the trial against him, or, what is the same thing, it is insisted it was error in the court not to grant him immunity from prosecution.

Of course the demurrer admits the facts alleged in the plea, and there can be no controversy as to what they are. Shortly stated the principal facts are that, upon the written request of the Governor of Illinois, the President of the United States issued an extradition warrant, directed to the government of the Republic of Peru, for the surrender of defendant under the treaty of our Government with that government, and named therein Henry G. Julian as messenger to receive defendant from the authorities of Peru. The crime of larceny, with which defendant stood charged, is one of the offences specified in the treaty for which a party should be surrendered, and it was specified in the President's warrant as the crime for which his surrender was demanded. On the same day the executive warrant was issued the Secretary of State at Wash-
ington made a written request upon the United States consul
46 acting at Lima to procure the executive of Peru to surrender
defendant to Julian under the treaty between the United States and Peru of September 12, 1870, which it is averred was and is the only treaty in force between the two governments. It is then averred no request was ever made by the U. S. consul at Lima or by Julian or any other person before any of the authorities or diplomatic agents of the government of Peru for the surrender of defendant in compliance with the President's warrant, nor was any consent or authority given by the authorities or diplomatic agents of Peru to Julian or to any other person to arrest and remove defendant from Peru for any cause; and on the 3rd day of April, 1883, while defendant was domiciled at Lima, in Peru, Julian, with the aid of persons whose names are unknown, without any authority or warrant from the authorities or diplomatic agents of Peru, arrested defendant and forced him to go to Callao, and there placed him on board the steamship "Essex," and kept him a close prisoner on such vessel.

Afterwards the "Essex" sailed to the port of Honolulu with defendant on board, and there at that port, but perhaps outside the habor, defendant was transferred to the "City of Sidney," an
American ship about to sail for San Francisco, in California.
47 The steamship "Essex" was a vessel belonging to the Navy
of the United States and was at the time commanded by officers of the Navy. The "City of Sidney" was perhaps an American merchant vessel, but how that is matters little. While these events were transpiring the parties prosecuting procured from the Governor of the State of Illinois a requisition upon the Governor of California for the arrest of defendant, in which Frank Warner was named [as] a suitable person to receive defendant from the authorities of California and bring him to this State for trial. Afterwards the Governor of California issued his warrant in pursuance with the requisition of the Governor of the State of Illinois for the arrest of de-

fendant. On his arrival at San Francisco in the "City of Sidney" defendant was arrested on the warrant of the Governor of California and delivered to Frank Warner, the messenger named to receive him, and was by him brought into this State and delivered into the custody of the sheriff of Cook county, where the indictment on which he was afterwards tried was found and was then pending in the criminal court against him. Other matters are contained in the plea, but, as they are not necessary to an understanding of the discussion that is to follow, they need not be stated.

48 One proposition asserted by counsel for the defense is the criminal court of Cook county never obtained jurisdiction of defendant by "due process of law" for the purpose of trying him for larceny or any other crime.

The position taken on this branch of the case is much weakened by the consideration, it appears, from the averments of the plea itself. The bringing of defendant into the State, trying him for an offence committed within its limits, was by "due process of law," whatever wrong may have been done him elsewhere. The Governor of the State of Illinois made a requisition upon the Governor of the State of California for the surrender of defendant as a fugitive from the justice of the State and designated Frank Warner to receive defendant and bring him back to this State. In compliance with that requisition the Governor of California did issue his warrant, upon which defendant was arrested within the jurisdiction of that State and delivered into the custody of Frank Warner, who brought defendant into this State and delivered him to the sheriff of Cook county. That was in accordance with usage and law. It is not allowable on the trial of one who has been surrendered by a sister State, under the laws of Congress, as a fugitive from justice to enquire as to the regularity or irregularity of such surrender. It affects neither the guilt or innocence of the accused nor the jurisdiction of the court to try him.

49 Conceding, as may be done, defendant was arrested in Peru and brought into the State of California without warrant of law, the *the* State now prosecuting defendant was not a party to any violation of any treaty or other public law. The application the State made to the executive department of the General Government was for the legal arrest of defendant, and if there was any abuse of the warrant of the Federal Government or any treaty obligations with a friendly power violated it was done by the State now conducting the prosecution against defendant. Julian, whom it is alleged made the illegal arrest of defendant and brought him within the jurisdiction of the State of California, was acting either under the warrant of the President or on his own responsibility. He did not bring defendant into this State at all. It was done by another person on a requisition from the Governor of Illinois and on a warrant issued by the Governor of California for his arrest in that State. Of the action of the State prosecuting him defendant can have no just ground of complaint that he was brought within its jurisdiction without "due process of law." The People *vs.* Rowe, 4 Parker, Cr. Rep., 253; Advance *vs.* Lagrave, 59 N. Y., 110; the State *v.* Ross, 21 Iowa, 467.

But waiving every objection to the plea that may seem too technical, and considering it on the broadest grounds taken in its
50 support, it is thought the demurrer was properly sustained.

Three propositions are stated, which, if they can be maintained, it is insisted, lead to the conclusion the criminal court of Cook county never obtained jurisdiction of defendant to try him for larceny or any other crime: 1st, that the United States, by its treaty with the Republic of Peru, provided "due process of law" for getting jurisdiction of persons domiciled in that country charged with having committed certain crimes, among which is larceny, of which defendant was charged in one count of the indictment against him; 2d, that such "due process of law" must be obeyed in all its terms, expressed or implied, and, 3rd, that such "due process of law" for the purpose of getting jurisdiction in such cases by necessary implication excludes any other mode of getting jurisdiction.

The defendant was not in fact brought within the jurisdiction of the United States under its treaty with Peru, but the argument assumes that if defendant was brought back to the United States otherwise than under the treaty between the United States and Peru his capture and detention would be unlawful as being in violation of a right of asylum he is supposed to have had under the treaty at the place he was domiciled when captured. No principle is suggested on which this proposition can be maintained as broadly as stated, nor is
51 any case, English or American, cited, where the decision was rendered on analagous facts with the case being considered, that holds the doctrine contended for. Undoubtedly, at common law the rule is, the court trying a party for a crime committed within its jurisdiction will not investigate the manner of his capture in case he had fled to a foreign country and had been brought back to its jurisdiction, although his capture had been plainly without authority of law. It is sufficient the accused is in court to require him to answer the indictment against him. It is thought, and with good reason, any other rule would work great embarrassment in the administration of the criminal law. In *ex parte* Scott, 9, Barn and Cress, 446, the accused was arrested at Brussels by a police officer without any warrant of law and brought back to England. The prisoner was brought up on *habeas corpus* that she might be discharged. It appeared a true bill had been found against her for a misdemeanor, and Lord Linderden, before whom the writ was heard, refused to enquire into the circumstances of her arrest, whether it was legal or illegal, and held the accused amenable to justice. It was said in that case if the act complained of were done against the law of a foreign country that country might have vindicated its own
52 law. It does not seem to be doubted that this case accurately states the common law on this subject, nor is it doubted that many well-considered American cases declare the same doctrine. The State *vs.* Smith Bailey (South Car), Law Rep.. 281, & note; The State *vs.* Brewster, 7 Vir., 118; Advance *vs.* Lagrave, 59 N. Y., 110; The State *v.* Ross, 21 Iowa, 467; U. S. *vs.* Caldwell, 8 Blatch., 131; U. S. *v.* Lawrence, 13 Blatch., 295.

The rule is different in civil cases for the reason a party guilty of a fraud in being a party within the jurisdiction of the court will not be permitted to have a personal advantage from his own wrongful conduct.

It may be well to recur again to the distinction taken by counsel, which, it is insisted, takes the case being considered out of the rule established by the English and American cases cited that some further discussion may be had upon it. The position taken is that where a treaty exists between two governments no capture can lawfully be had of a party accused of crime in the country to which he has fled for asylum, except under the terms of such treaty, and if a capture and removal of a party is made in violation of the treaty it is without "due process of law." and the court within whose jurisdiction the accused is wrongfully brought obtains no rightful
jurisdiction to try him for any crime, either for the crime for
53 which it was attempted to extradite him or for any other crime.
This exact question arising in this case was not involved in either of the cases *ut supra*, nor, indeed, has the attention of the court been called to any case where the facts were precisely analogous. Of course no one would contend [that] the manner of the capture of one accused of crime who has fled from the justice of the State could affect in any manner the question of his guilt or innocence of the crime charged in the indictment, and how can it affect the jurisdiction of the court before whom he stands to try him for crime is a proposition not supported by any satisfactory reasoning nor by the analogies of the law; but place it on the yet broader and perhaps more reasonable ground, [and] it is not perceived how any irregularity in the capture and return of a fugitive from the justice of the State can secure him immunity from prosecution for crime, whether it is one for which he might be lawfully extradited under any public law or not. No reason arising out of any public exigency or any consideration as to the liberty of the citizen requires the adoption of any such doctrine into the jurisprudence of the State. Should the laws of a foreign nation be outraged by the wrongful capture and transportation of a party accused of crime,
and who at the time was domiciled within its jurisdiction, in
54 case a controversy arose it would seem it would be between
the two general governments, and as to which the State courts could determine nothing.

It is confidently insisted all through the argument for the defense that defendant's right of asylum under the treaty between the two governments was complete when he was domiciled in Peru, and that he has been deprived of that right by sheer force without "due process of law." But is that position tenable? Upon what principle can it be maintained? As a question of law on the facts as stated in the plea defendant never had any right of asylum in Peru that would secure him immunity from arrest on account of offences mentioned in the treaty, and for which a party was subject to extradition.

Conceding, as may be done for the purposes of this decision, the proposition insisted upon, the enumeration of certain crimes in the treaty for which a party may be extradited implies that as to all other offences he is guaranteed asylum in the country where he is domiciled, how does that, if true, affect the question being considered?

As to the crime of larceny with which defendant was charged he could have no right of asylum in Peru, as that is one of the
55 crimes enumerated in the treaty, and what right secured by
treaty was violated when he was arrested, either with or without due process of law? The accused was subject to extradition at any time under the treaty, and what difference can it make in law as to the right of a State court to try defendant for an extraditable crime, whether the existing treaty was in fact observed in all its forms? That which was done, if wrong, was in violation of international law, and if the government of Peru does not complain of the arrest of defendant within its jurisdiction as an infraction of international law it does not lie in the mouth of defendant to make complaint on its behalf. Questions arising under international law concern principally the nations involved, and their settlement is a national affair.

Rejecting, as must be done, the erroneous assumption defendant had the right of asylum in Peru under the treaty between the two governments and the argument for the defense is wholly within force. It is plain he had no right of asylum the law of either government would protect. The treaty as to the crime of larceny with which defendant stood indicted had provided no asylum that would secure him immunity from arrest for that crime in the country where he was domiciled. The utmost that can be claimed is
56 that the person having the President's warrant for the extra-
dition of defendant proceeded irregularly, and may have rendered himself liable, as for a personal trespass, but he deprived defendant of no right of asylum in the country of his temporary domicil, for the simple reason he had none secured by any public law of which he could be dispossessed.

The attention of the court has been called to Com. *v.* Haines, 13 Bush., 700; The State *v.* Vanderpool, 16 Vol. C. L. N., p. 34, and other analogous cases, upon which great stress is laid as holding principles it is insisted ought to control the present decision. These cases have been examined, and it is found they hold the doctrine a fugitive from the justice of the State who has been brought back from the country to which he had fled on a warrant of extradition in conformity with the terms of a treaty existing between the two governments cannot be proceeded against or tried by the State for any other offenses than those mentioned in the treaty, and for which he was extradited without first being afforded an opportunity to return to the country whence he had been brought. Some of these cases also declare the familiar principle of international law that the right of one government to demand and
57 receive from another the custody of an offender against
its laws, and who has sought an asylum in such foreign country, depends upon treaty stipulations between such governments. Where no treaty exists no obligation that can be insisted upon exists to surrender criminals for trial to the government from

which they have fled, but, as a matter of comity between friendly nations, great offenders are usually surrendered on request from the government claiming the right to try them. A principle running through this latter class of cases has much that commends itself to a sense of justice. It is that where a person whose extradition has been granted for trial for a particular crime named in the extradition warrant the demanding government obtains no lawful right to try him for any other offenses without bad faith to the government that consented to his extradition, and for which it would have just grounds to demand reparation. Such an act would be in violation of both the letter and spirit of the treaty. But this doctrine, if it shall be conceded it has for its support natural justice, and even the weight of authority, can have no application to the case being
considered. Here the complaint is the treaty was not ob-
58 served in the capture and detention of defendant. It was
done by force outside of its provision. The extradition warrant issued by the Executive of the United States demanded defendant should be surrendered on a charge of larceny that he might be tried for that offense. That is an extraditable crime under the treaty with the government of Peru. It was on that charge he was put on trial. It is true he was not convicted of larceny as at common law, but the same indictment contained counts for embezzlement, an offense of which, if convicted, the statute declares "he shall be deemed guilty of larceny," upon which he was tried at the same time of the trial of the charge of larceny and was convicted. Embezzlement, as defined in section- seventy-four and seventy-five of the criminal code of this State, is not larceny at common law, and is, perhaps, not larceny in the sense that term is used in the treaty with Peru, and for which a party may be extradited. Had defendant pleaded immunity from prosecution on the counts which charge him with embezzlement, and not as to the count that charges him with larceny, as at common law, which is, as has been seen, an extraditable crime under the treaty with Peru, then
a closer analogy would have existed between his case
59 and the cases last cited, and the question might have been
presented whether this court would adopt the doctrine of those cases as sound law. That he did not do. By his plea he sought immunity from prosecution on the whole indictment. The plea might have been good as to the counts that charged embezzlement, being a non-extraditable offense and not embraced in the extradition warrant, and not good as to the count that charges larceny, as at common law, which, it is conceded, was an extraditable offense and was embraced in the extradition warrant. Being bad as to one count, the plea would be bad as to the whole indictment which it professed to answer. There is another reason that leads to the same conclusion — the case in hand is not within the rules declared in the latter line of decisions. It is that defendant, as has been seen, was not surrendered by the government of Peru under its treaty with the United States. According to the averments in the plea no effort was made to obtain defendant on the extradition warrant, and the official authorities of Peru were not asked to and

never did consent to his capture within the jurisdiction of that gov-
ernment. It was done by sheer force and not under the
60 treaty at all. That brings the case more nearly under the
decisions first cited, and they must be regarded as of controll-
ing authority.

But, aside from all authority, on principle, defendant has shown no right to immunity from prosecution for the offenses for which he was indicted. . The Federal Government has itself violated no treaty with the Republic of Peru. The arrest and detention of defendant was not by any authority of the General Government, and no obligation is implied on the part of the Federal or any State government to the Republic of Peru to secure defendant immunity from prosecution for any offense. What was done was done by individual wrong, precisely as was done in *Ex Parte* Scott, *supra*, and The State *vs.* Brewster, *supra*. The invasion of the sovereignty of Peru, if any wrong was done, was by individuals—perhaps some of them owing no allegiance to the United States—and not by the Federal Government. Should the government of Peru complain its sovereignty had been invaded by citizens of the United States, that would be a question arising under international law and not under any act of Congress or treaty of the United States. Nor will defendant be permitted to complain that his right of asylum in Peru has been violated, for, as before stated, he had no right of asylum
as against the crime of larceny, under the treaty with Peru,
61 nor any absolute right to asylum under comity existing be-
tween nations.

Whether a nation will surrender a fugitive from justice that seeks with it an asylum is a question of national comity resting in discretion. In no view that can be taken is defendant entitled to immunity from prosecution on the indictment under which he was convicted.

Errors have been assigned that effect the merits of the case on the trial that must be considered. That defendant converted to his own use large sums of money and securities belonging to the firm of Preston, Kean & Co., or to other persons in their care and custody, admits of no doubt. There is no pretense he is not guilty of criminal conduct. The objections taken to the legality of his conviction are of the most technical character.

The point is made there is a variance in the pleading and the proof. It is alleged in the indictment the funds and securities embezzled were the personal goods of David Preston, Samuel A. Kean, and Elisha Gray, a copartnership under the name of Preston, Kean & Co., and the insistence is the firm in law was composed of David Preston, Samuel A. Kean, and James Payne, with Elisha Gray as
special partner. Certified copies from the record and files of
62 the county clerk's office show the formation of a limited part-
nership pursuant to the provisions of the statute, and that
the firm was at one time composed of David Preston, Samuel A. Kean, and James Payne as general partners, with Elisha Gray as special partner. That was in May, 1881. The oral testimony given shows that in November, 1881, the special partnership ceased, and

since then the firm, as a matter of fact, has been composed of David Preston, Samuel A. Kean, and Elisha Gray.

The partnership articles of May, 1881, were made a matter of record, but it does not appear there were any partnership articles after that date, and it is insisted it is not legal to show, by oral evidence, as was done, that Payne ceased to be a partner in November, 1881. The objection taken rests on section 12, chap. 84, R. S. 1874, which provides: No dissolution of a limited partnership shall take place except by operation of law before the time specified in the certificate made a matter of record unless a notice of such dissolution is also recorded in the same registry and other provisions of the statute complied with. The time for the duration of the partnership under the articles of May, 1881, had not expired in November, 1881, when an agreement was made between the partners that Payne should cease to be a partner and Gray should
63
become a general partner. The firm name continued as it was, but no notice of the change of the persons composing the firm was made a matter of record, nor was any other public notice given as the statute requires shall be given. On account of the non-compliance with the statute in this regard, it is said the firm should be regarded as still being composed of the same persons as composed it under the articles of May, 1881. That may be true as to creditors and persons dealing with the firm without actual notice, but as between the partners themselves Payne had no interest whatever in the firm assets, after the agreement he should cease to be a partner. It is sufficient under the law of this State that the property is alleged in the indictment to belong to the persons who in fact own it or have a special interest in it. That was done in this case and there is no variance between the proof and the allegations of the indictment in this respect.

It is insisted the evidence shows a cumulation of offenses, and for that reason it was error in the court to deny defendant's motion to compel the prosecution to elect upon what alleged act of larceny or embezzlement a conviction would be asked. The court by its rulings submitted all the evidence touching the embezzle-
64
ment of funds and securities by defendant to the jury and it is not perceived how it could properly have done otherwise. Embezzlement is a crime defined by statute, and it was entirely competent for the Legislature to declare what acts would constitute the crime and fix the measure of punishment. One element that enters into the statutory definition of embezzlement is the fiduciary or confidential relation. Such relation afford- the amplest opportunity to misappropriate money, funds, and securities, and often presents great difficulty in proving exactly when and how it was done. This is especially true with regard to clerks and confidential agents in banks or other corporations or firms doing a large business and who are entrusted in whole or in part with the care or custody of funds, securities, and property belonging to banks or other corporations or to a copartnership. It is difficult in such cases, if at all possible, to prove with certainty when or how the embezzlement was effected.

It is of course done with a view to avoid detection, and the confidential relations existing ward off suspicion.

The embezzlement may, and most often does, consist of
65 many acts done in a series of years, and the fact at last dis-
closed that the employer's money and funds are embezzled is
the crime against [which] the statute is leveled. In such cases should
the prosecution be compelled to elect it would claim a conviction for
only one of the many acts of the series that constitute the *corpus
delicti.* It would be doubtful if a conviction could be had under
sections 75 & 76 of the criminal code against the clerk in a bank or
other corporation or a copartnership, although the accused might
be conceded to be guilty of embezzleing large sums of money in the
aggregate.

It might be otherwise or different under section 74 of the criminal code, where distinct sums of money or articles of personal property are or may be delivered to the accused on different occasions *write* (can't make out this word) a part. Such distinct acts might very readily be susceptible of direct proof, for the act of delivery implies actual knowledge in some one who could be a witness; but no such opportunity is afforded to make direct proof as to acts done under sections 75 and 76, defining embezzlement.

The body of the crime consists of many acts done by virtue of the
confidential relations existing between the employer and the em-
ployee with funds, monies, or securities over which the serv-
66 ant is given care or custody, in whole or in part, by virtue of
his employment. The separate acts may not be susceptible
of direct proof, but the aggregate result is, and that is embezzlement.
To avoid the difficulty, no doubt, that might be encountered in
making proof in such cases it is provided by statute, section 82 of
the criminal code, in the prosecution for the offense of embezzling,
fraudulently converting to one's own use, or fraudulently taking or
secreting with intent so to embezzle and convert the bullion, money,
notes, bank-notes, checks, drafts, bills of exchange, or other security
for money, by a cashier or other officer, clerk, agents of such person,
bank, incorporated company, or corporation or copartnership, it shall
be sufficient to allege generally in the indictment an embezzlement,
fraudulent conversion, or taking with such intent funds of such per-
son, bank, incorporated company or copartnership, to ascertain value
or amount without specifying any particulars of such embezzlement.
Indeed, in the very nature of the crime it would be impracticable
in most cases to do more. The case being considered shows in a
marked degree the necessity for the rule provided by statute. Other-
wise it would be difficult to make the proof and the allegations of the
indictment correspond. On the trial the same liberal rule for
67 the detention and punishment of persons guilty of miscon-
duct by reason of their confidential relations with their em-
ployer prevails, for it is provided in the same section of the criminal
code evidence may be given of any such embezzlement, fraudulent
conversion, or taking with such intent, and it shall be sufficient to
maintain the charge in the indictment if it is proved that any
bullion, money, note, bank-note, check, draft, bill of exchange, or

other security for money of such person, bank, incorporated company, or copartnership, of whatever value or amount, was fraudulently embezzled, converted, or taken with such intent by such cashier or other officer, clerk, agent, or servant. Under this rule, which is certainly a wise one, it was proper the court should permit all the evidence of what defendant did by reason of his confidential relations with the banking firm, whose clerk he was, to go to the jury, as was done, and if the jury found from the whole evidence any funds or securities for money had been embezzled or fraudulently converted to his own use by defendant, it was sufficient to maintain the charge of embezzlement as that crime is defined in the 75th and 76th sections of the criminal code. Any other rule would render it exceedingly difficult to secure a conviction under either of these sections of the statute.

68 The view taken by the defense of this statute is too narrow and technical to be adopted. It has a broader meaning, and when correctly read it will embrace all wrongful conduct by confidential clerks, agents, or servants, and leave no opportunity for escape from just punishment on mere technical objections not affecting the guilt or innocence of the party accused. The cases of Keib *v.* The People, 82 Ills., and Goodhue *vs.* The People, 94 Ill., 37, cited by the defense, were prosecutions for embezzlement under other sections of the criminal code, and illustrate no phaze of the case being considered. There was no error in the court refusing to require the prosecution to elect for what particular act of embezzlement a conviction would be asked.

The last ground of objection is the verdict is without evidence and against the law. Ordinarily, whether there is evidence to wara conviction is a question for the jury, the court taking care always to see that no manifest injustice is done. With that view the evidence has been considered. It is seen the testimony of other witnesses taken in connection with defendant's letter to the banking firm written on the eve of his departure with the schedule attached of securities and money embezzled constitute ample proof of the *corpus delicti.* It would answer no good purpose to enter upon an analysis of the evidence; it is sufficient to state the conclusion reached.

69 But whether the verdict is contrary to law is a question for the court, and that has been fully considered. The objection in this regard goes to the extent that admitting all the evidence tends to prove it does not constitute embezzlement under the 75th section or any other section of the criminal code. The argument on this branch of the case is based on a misconstruction of that section of the criminal code defining the cause of embezzlement. There are two counts in the indictment that charge defendant with embezzlement. On examination it will be seen they are both substantially in the language of the statute, and that is all the law requires. In the 1st count it is charged defendant embezzled securities for money, gold coin, and other funds and property of Preston, Kean & Co. "then and there entrusted" to defendant, and in the 2d count it, defendant, being then and there a clerk in the employ

of Preston, Kean & Co., fraudulent- and feloniously did, without then and there having the consent of such firm, embezzle and fraudulently convert to his own use a large amount of the personal goods, funds, and money, all of which is described with sufficient particularity, which personal goods, money, and funds "then and there came to the possession" of defendant "by virtue of such employment." It will be observed the 75th section of the statute, under which the second count in the indictment was evidently
70 framed, makes it an offence for a person occupying such confidential relations to embezzle property of his employer or that of another that comes to his possession or under his care, or to secrete the same with intent to do so by "virtue of his employment" with the owner or owners.

The words "under his care," found in the 75th section of the statute, are not used in this second count of the indictment, and it is contended the proof fails to show the funds and property alleged to have been embezzled were ever in the possession of defendant by virtue of his employment, and for that reason it is said he is not guilty under this count. The word "care," as used in the statute, is the equivalent of "custody," and may mean "charge," "safe-keeping," "preservation," "security," and it would seem it was in that sense it was used in the statute. "Possession," as used in the same section, has perhaps a slightly different and broader meaning than the word "care," but it may also mean "to keep," "to take or seize hold," "to hold or occupy" as owner of property would or might do. It matters little whether one or both words were used in the indictment. A close reading of the testimony will show the funds embezzled were quite as much in the possession of defendant as under his care. It is idle to say, in view of the relations defendant sustained to the banking firm, as disclosed by the testimony,
71 that the funds and securities in the vaults were not in possession of defendant and other persons employed about the bank, and who had access to such funds and securities for one purpose or another. If the indictment cannot be maintained on the ground — the funds and securities embezzled were in the possession of defendant as that term is used in the statute by virtue of his employment it could not had it been alleged they were under his care or had it been charged they came both to his possession and under his care by virtue of his employment, and — case would be presented where a clerk converted to his own use $44,000 of his employer's money and securities and yet — guilty of no crime within the meaning of this section of the statute. So narrow a construction as that insisted upon would render nugatory this section of the statute which defines embezzlement by clerks and confidential agents.

It seems to be claimed, as to the money, bonds, and property alleged to have been embezzled of his employers, the taking of them out of these vaults by defendant was larceny at common, and therefore could not be embezzlement under 75th section of the criminal code. No such subtle reasoning as that will satisfy the common understanding. It is not denied that defendant converted to his own use large sums of money and securities belonging to the bank

while he was in its employ as a clerk, and that such funds
72 did in some way come to his possession.

How did he come to get possession of such funds and securities for money if it were not by virtue of his employment? Had he not been in the employ of this banking house he could have had no access to those vaults.

No attempt will be made to ascertain defendant's exact relation with the bank. It is enough to know his position, whatever it was, gave him access for some purposes at least to the vaults where the funds and securities were kept, and that brought the funds and securities embezzled into his possession, or, what is really the same thing, under his care in a measure by virtue of employment. It was simply by virtue of his employment and not otherwise that he got possession of his employer's money and securities, and converted the same to his own use, and that is embezzlement under the 75th section of the criminal code. It is that for which he was indicted and convicted, and it is the offence defined by the statute.

It is to be observed the statute of this State defining the crime of embezzlement is much more comprehensive than any English statutes on the same subject that have — examined, and especially that section which defines embezzlement by a clerk or confidential agent who converts to his own use funds belonging to his employer, which
may come to his possession or under his care by virtue of his
73 employment, and the decisions of the English courts construing their own statutes do not in any way assist to a correct understanding of the statutes of this State on the same subject.

Much of what is said by text writers, to which the attention of the court has been called, was said with reference to English statutes, which are materially different from that section of the statute of this State under which defendant was indicted. On account of the dissimilarity of the statutes it has not been thought necessary to remark upon English embezzlement statutes nor upon the decisions of English courts construing them. Decisions have been rendered by courts of some of our sister States construing statutes substantially like section 75 of the criminal code of this State, that makes the embezzlement of money or personal goods larceny, among which are The People *vs.* Sherman, 10 Wend., 299; The People *vs.* Dalton, 15 Wend., 581, and Loewenthal *v.* The People, 32 Ala., 589.

So much of the reasoning in the opinions in the cases cited as is applicable to the present decision may be read as being in harmony with the views expressed in this opinion.

No error affecting the merits of the case appearing in the record the judgment is affirmed.

Judgment affirmed.

74 STATE OF ILLINOIS, *ss:*

Supreme Court, Northern Grand Division.

I, Everell F. Dutton, clerk of the supreme court in and for the northern grand division of the State of Illinois, and keeper of the records and files thereof, do hereby certify that the foregoing is a true copy of the final opinion of the said supreme court in the above-entitled cause, of record in my office.

In testimony whereof I have set my hand and affixed the seal of the said supreme court, at Ottawa, this 20th day of May, in the year of our Lord one thousand eight hundred and eighty-four.

[Seal of the Supreme Court, State of Illinois. Aug. 23, 1818.]

E. F. DUTTON,
Clerk of the Supreme Court.

75 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable the judges of the supreme court of Illinois, Greeting:

[Seal of the Supreme Court of the United States.]

Because in the record and proceedings as also in the rendition of the judgment of a plea which is in the said supreme court before you, or some of you, being the highest court of law & equity of the said State in which a decision could be had in the said suit between Frederick M. Ker, plaintiff in error, and The People of the State of Illinois, defendants in error, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity; or wherein was drawn in question the construction of a clause of the 76 Constitution, or of a treaty or statute of, or commission held under, the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission, a manifest error hath happened, to the great damage of the said plaintiff in error, as by his complaint appears, we, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Morrison R. Waite, Chief Justice of the said Supreme Court, the first day of February, in the year of our Lord one thousand eight hundred and eighty-six.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

Allowed by—
JOHN M. HARLAN,
Justice Sup. C't U. S.

77 UNITED STATES OF AMERICA, *State of Illinois,* } *ss:*

Supreme Court, Northern Grand Division.

To the honorable the Chief Justice and associate justices of the Supreme Court of the United States:

I, Alfred H. Taylor, clerk of the supreme court of Illinois in and for the northern grand division of said State of Illinois, and keeper of the records and seal thereof, do certify and return to the said annexed writ of error that the certified copy of the record and proceedings in said supreme court of Illinois hereunto annexed is a full, true, and correct copy of all the record and proceedings in said supreme court of Illinois in the said cause wherein Frederick M. Ker was plaintiff in error and The People of the State of Illinois were defendants in error, wherein judgment was rendered by said supreme court of Illinois against said plaintiff error on the nineteenth day of May, A. D. 1884 (saving and reserving from said record, however, upon order and direction of said plaintiff in error, the bill of exceptions preserved in said record upon the trial of said cause before the jury in said criminal court of Cook county); and I further return herewith a full, true, and complete copy of the opinion of said supreme court of Illinois, certified under the seal of said supreme court of Illinois on the twentieth day of May, A. D. 1884.

Witness my hand and the seal of the supreme court of Illinois, at Ottawa, in the said northern grand division of said State, this sixth day of February, in the year of our Lord one thousand eight hundred and eighty-six.

[Seal of the Supreme Court, State of Illinois. Aug. 23, 1818.]

A. H. TAYLOR,
Clerk of the Supreme Court.

78 The United States of America to The People of the State of Illinois, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of Illinois, wherein Frederick M. Ker is plaintiff in error and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable John M. Harlan, associate justice of the Supreme Court of the United States, this first day of February, in the year of our Lord one thousand eight hundred and eighty-six.

JOHN M. HARLAN,
Justice Supreme Court of U. S.

79 On this sixth day of February, in the year of our Lord one thousand eight hundred and eighty-six, personally appeared George W. Schuessler before me, the subscriber, J. A. Jones, clerk of the circuit court of the United States for the southern district of Illinois, and makes oath that he delivered a true copy of the within citation to Hon. George Hunt, attorney general of the State of Illinois, at Springfield, on the sixth day of February, A. D. 1886.

GEO. W. SCHUESSLER.

Sworn to and subscribed the sixth day of February, A. D. 1886.

[The Seal of the Circuit Court of the United States for the South'n Dist. Ill.]

J. A. JONES,
Clerk Circuit Court U. S., South. Dist. Ills.

[Endorsed:] United States of America, southern district of Illinois: I have executed the within by delivering a true copy thereof to George Hunt, attorney general of the State of Illinois, at Springfield, Illinois, this 6th day of February, A. D. 1886. H. G. Weber, U. S. marshal, by Geo. W. Schuessler, deputy. Service, $2.00.

Endorsed on cover: Illinois supreme court. No. 1275. Frederick M. Ker, plaintiff in error, *vs.* The People of the State of Illinois. Filed March 1, 1886.

119/436

Office Supreme Court U. S.
FILED.
MAR 8 1886
JAMES H. McKENNEY,
CLERK.

IN THE

Supreme Court of the United States,

OCTOBER TERM, A. D. 1885.

FREDERICK M. KER,
Plaintiff in Error,
VS.
THE PEOPLE OF THE STATE OF ILLINOIS,
Defendant in Error.

Error to the Supreme Court of Illinois.

MOTION AND SUGGESTIONS TO ADVANCE.

And now comes Frederick M. Ker, said plaintiff in error, and prays the court here to advance said above entitled cause upon the docket of said court and to set the same for hearing at a near day, by the court here to be fixed, and in support of this, his said motion, said plaintiff in error suggests:

That the writ of error in this said cause, granted by Hon. Jno. M. Harlan, associate justice of this court, on the first day of February, 1886, has been duly returned into this court by Alfred H. Taylor, Esquire, Clerk of Supreme Court of Illinois, together with a certified

copy of all the record and proceedings in said cause before said Supreme Court of Illinois, and a certified copy of the opinion of said Supreme Court of Illinois in said cause.

That the citation out of this court, together with a notice of this motion, was on the sixth day of February, 1886, duly served by H. G. Weber, Esq., Marshal of the United States in and for the Southern District of Illinois, upon Hon. George Hunt, attorney general of said State of Illinois, as will more fully appear from said citation and said notice, and the several returns thereon, now on file in this court and cause.

That this plaintiff in error is now confined a prisoner in the penitentiary of said State at Joliet, in said State, under and by virtue of the judgment and proceedings which this said writ of error is prosecuted to review.

That said writ of error is prosecuted to review the judgment of said Supreme Court of Illinois in a criminal case, where a right of exemption under a treaty of the United States was and is set up and claimed by the plaintiff in error, and the judgment of said Supreme Court of Illinois was adverse to such claim.

ROBERT HERVEY and
C. STUART BEATTIE,
For Plaintiff in Error.

119/436

APR 20 1886
JAMES H. McKENNEY,
CLERK.

IN THE

Supreme Court of the United States,

OCTOBER TERM, A. D. 1885.

FREDERICK M. KER,
Plaintiff in Error,
vs.
THE PEOPLE, ETC.,
Defendants in Error.

Error to the Supreme Court Of Illinois.

Brief and Argument for Plaintiff in Error.

ROBERT HERVEY AND
C. STUART BEATTIE,
ATTORNEYS FOR PLAINTIFF IN ERROR.

CHICAGO, ILL.:
BRADBURY BROTHERS, LEGAL PRINTERS, 78 FIFTH AVE.
1886.

IN THE

Supreme Court of the United States,

OCTOBER TERM, A. D. 1885.

FREDERICK M. KER, *Plaintiff in Error,*		*Error to the*
VS.		*Supreme Court*
THE PEOPLE, ETC., *Defendants in Error.*		*Of Illinois.*

Brief and Argument for Plaintiff in Error.

ROBERT HERVEY AND
C. STUART BEATTIE,
ATTORNEYS FOR PLAINTIFF IN ERROR.

CHICAGO, ILL.:
BRADBURY BROTHERS, LEGAL PRINTERS, 78 FIFTH AVE.
1886.

STATEMENT OF THE CASE.

At the February Term, 1883, of the Criminal Court of Cook County, Illinois, the grand jury returned an indictment against this plaintiff in error containing four counts, charging embezzlement as bailee, embezzlement as clerk, larceny and the receiving of stolen property. The plaintiff in error being arraigned on October 13, 1883, pleaded to the jurisdiction of the court over his person. A general demurrer was filed by the people to this plea, which the Criminal Court sustained and ordered plaintiff in error to plead over, which he refused to do. Thereupon the court below, pursuant to the Illinois statute, entered a plea of not guilty for him, and over his protest called a jury to try the cause. The jury found plaintiff in error guilty on the embezzlement counts and sentenced him to ten years imprisonment in the penitentiary at Joliet. A motion for a new trial was overruled and judgment had upon the verdict, and a writ of error prosecuted to review the judgment upon the demurrer and upon the merits, to the Supreme Court of Illinois. That court having affirmed the judgment of the Criminal Court, both upon the demurrer and upon the merits, this writ of error is prosecuted to this court, to review the judgment of the Supreme Court of Illinois, upon the federal question presented by the plea to the jurisdiction.

ERRORS ASSIGNED

First, "That said Supreme Court of Illinois erred in affirming the judgment of said Criminal Court of Cook

County, sustaining the demurrer to plaintiff in error's plea to the jurisdiction of said Criminal Court."

Second, "That said Supreme Court of Illinois erred in its judgment aforesaid, in failing to enforce the full faith and credit of the federal treaty with the Republic of Peru, invoked by plaintiff in error in his said plea to the jurisdiction of said Criminal Court."

ARGUMENT.

The plea to the jurisdiction alleges in substance:

That the indictment here and another indictment, for forgery, were presented by the same grand jury against defendant; that on the same day the Governor of Illinois requested an extradition warrant, from the President, upon the Peruvian authorities, with the appointment of one Henry G. Julian as messenger; that such warrant issued; and also a request from the Federal Secretary of State to the U. S. Acting Consul at Lima, to procure the surrender of Ker, by the Peruvian authorities, to Julian under the extradition treaty of Sept. 12, 1870; that the warrant directed Julian to get Ker "under and by virtue of treaty stipulation." That no request was ever made upon the Peruvian authorities, or diplomatic agents, by any person for such arrest, and that none of the Peruvian authorities, or agents, ever gave any consent to any one to arrest Ker; that Julian and others arrested Ker in Lima, where he resided, on April 3, 1883, without any authority in law; that they immediately carried him to Callao and forcibly placed him on the U. S. man-of-war Essex, and confined him there until May 10th; that the Essex then brought him to Honolulu, and he was kept on board, in the harbor, several weeks until July 2d, when he was forced to go from the Essex, by the officers thereof and Julian, on board of the "City of Sidney" and carried to San Francisco, where he arrived July 9, 1883. That on June 18, 1883, the Governor of Illinois upon a written statement of Kean under oath, in which Kean represented: that defendant had been indicted in said court for embezzlement and larceny and receiving stolen property belonging to Preston, Kean & Co., and that defendant was a fugitive from justice, and that defendant was about to arrive in the State of California, and praying for a requisition upon the Governor of California for defendant's arrest, and that Frank Warner be appointed messenger in the premises; issued his requisition upon the Governor of California for the arrest of defendant upon a charge of larceny, and appointed said Frank Warner as messenger in the premises; that said indictment *was not certified to;* that the Governor of California on June 25th issued his warrant pursuant to such last mentioned requisition; that when Ker arrived in San Francisco said warrant was served upon him; that Warner and Julian brought him to Chicago and delivered him to the jailor; that said last mentioned extradition proceeding was void because he never was a fugitive from justice to California, and had never fled or gone there; that Julian utterly refused at all times to take him before any court or to permit him to advise with any law officer or counsel or attorney at law; that the Criminal Court never had lawful jurisdiction of his person, and prays to be discharged, etc.

At the time of Ker's arrest in Peru the United States treaty of extradition with that government, referred to in the President's warrant, provided: "That the parties, "having judged it expedient with a view to the better "administration of justice and the prevention of crime "within their respective territories and jurisdiction, that "the persons charged with the crimes hereinafter mentioned should, under certain circumstances, be reciprocally delivered up, have resolved to conclude a treaty "for this purpose."

"Art. I. It is agreed that the contracting parties "shall on requisition made in their name, through the "medium of their respective diplomatic agents, deliver "up to justice persons, who, being accused or convicted "of the crimes enumerated in Art. II. of the present "treaty, committed within the jurisdiction of the requiring party, shall seek an asylum, or shall be found "within the territories of the other; provided that this "shall be done only when the fact of the commission of "the crime shall be so established, as that the laws of "the country in which the fugitive or person so charged "shall be found, would justify his or her apprehension "and commitment for trial, if the crime had been there "committed."

(The extradition crimes include larceny and certain kinds of forgery and embezzlement.)

Spear on Extradition, 395.

It will be seen, then, by an inspection of the treaty and the plea, that the State authorities and Julian, the agent whose appointment the State authorities procured, did everything required by the terms of the treaty to be done, until the execution of the process in Peru. That Julian, for some reason best known to himself, disregarded every right of the accused stipulated for in the treaty, regarding the making of a demand upon the diplomatic agents of Peru for the surrender of Ker, and as to the furnishing of proof required by the treaty; but took forcible possession of the plaintiff in error, and with the aid of unknown persons and the naval officers of the United States ship Essex, kidnapped him.

The question arising upon this plea and treaty is simply this:

When the general government has provided by a positive law the mode and conditions upon which the authorities of the State shall reach into a foreign country to procure the presence of an accused person in its courts, can the conditions of that positive law be evaded, and the State obtain the benefit of such evasion?

The ultimate solution of this seemingly clear, but much misunderstood case, it is believed rests only upon the proper answer to two questions:

First, is this treaty a law to be enforced by the courts or simply an international compact, to be obeyed or waived at pleasure, by the contracting parties? And this question will here be first considered.

The familiar provision of the Federal constitution is as follows:

"This constitution, and the laws of the United States, "which shall be made in pursuance thereof, and all "treaties made or which shall be made under the author-"ity of the United States, shall be the supreme law of "the land, and the judges in every State shall be bound "thereby, anything in the constitution or laws of any "State to the contrary notwithstanding."

Sec 2, Art. 6, U. S. Const.

Notwithstanding this broad language of the constitution, some treaties are not a supreme law.

Chief Justice MARSHALL said in *Foster* v. *Neilson*, 2 Peters, at page 314:

"A treaty is in its nature a contract between two na-"tions, not a legislative act. It does not generally "effect, of itself, the object to be accomplished, especi-"ally so far as its operation is infra-territorial; but is "carried into execution by the sovereign power of the "respective parties to the instrument. *In the United "States a different principle is established.* Our consti-"tution declares a treaty to be the law of the land. It "is consequently to be regarded in courts of justice as "equivalent to an act of the legislature, whenever it "operates of itself without the aid of legislative provi-"sion. But when the terms of the stipulation import a "contract—where either of the parties engages to per-"form a particular act—the treaty addresses itself to the "political, not to the judicial department, and the leg-"islature must execute the contract before it can become "a rule of the court."

Then it must be conceded that every treaty is a law, "whenever it operates of itself without the aid of legislative provisions."

Now are extradition treaties within this rule?

The Court of Appeals of Kentucky having under consideration the construction of the extradition treaty with England, said; per Chief Justice LINDSAY:

"It will thus be seen, that with us a public treaty is "not merely a compact or bargain to be carried out by "the legislative and executive department of the general "government, *but a living law*, operating upon and "binding the judicial tribunals, State and Federal, and "these tribunals are under the same obligation to notice "and give it effect, as they are to notice and enforce the "constitution and the laws of Congress made in pur-"suance thereof."

Com. v. *Hawes*, 13 Bush. (Ky.) 700.

Judge **Deady** in the latest case on the subject, (Feb. 4, 1886,) speaking of the Ashburton treaty said:

"The treaty of 1842, is not only a contract between "the governments of Great Britain and the United "States, but by virtue of the constitution of the latter, "(article 6,) *is also the supreme law of this land.* It "contains an explicit enumeration of the offences for "which persons may be extradited under it, and, by "necessary implication, the person surrendered under "it is only allowed and held within the jurisdiction of "the receiving government for the purpose of trial on "the charge specified in the warrant for extradition.

"For the latter government to detain such person for "trial on any other charge, would be not *only* an infraction of the contract between the parties to the treaty, "but *also a violation of the supreme law of this land in* "*a matter directly involving his personal rights.* (Citing,) Field Extr. 107. A right of person or property, "secured or recognized by treaty, *may be set up as a* "*defense to a prosecution in disregard of either, with the* "*same force and effect as if such right was secured* by "an act of congress."

Ex parte Hibbs, 26 Fed. Rep. 431, (March 16, 1886.)

The Court of Appeals of Texas having under consideration the extradition treaty with Mexico, cited Chief Justice MARSHALL, in *Foster* v. *Neilson*, *supra*, and *Com.* v. *Hawes*, *supra*, and declared:

"It follows, therefore, that the judicial tribunals of "this State are required to take cognizance of and give "effect to the treaties made by the Federal government "with other nations, just as if they composed a part of "our criminal code."

Blandford v. *The State*, 10 Tex. Ct. Appls. Rep. 635.

The Supreme Court of Ohio, as late as October, 1883, considering and construing the extradition treaty with England, declared that it was a law to be enforced and construed by the courts.

State v *Vanderpool*, 39 Ohio Rep. 273.

Judge HOFFMAN of the United States District Court in California, in construing the English extradition treaty, declares the following proposition to be incontrovertible:

"When, therefore, it is provided by treaty that certain acts shall not be done, or that certain limitations "and restrictions shall not be disregarded or exceeded "by the contracting parties, the compact does not need "to be supplemented by legislative or executive action, "to authorize the courts of justice to decline to override "these limitations or to exceed the prescribed restrictions, for the palpable and all-sufficient reason that to "do so would be not only to violate the public faith, but "to transgress the supreme law of the land; (citing) *Com.* "v. *Hawes*, *supra*."

U. S. v. *Watts*, 14 Fed. Rep. 130

Having, it is believed, settled beyond peradventure the proposition that extradition treaties are a law of the *forum*, to be construed by the courts and enforced according to established rules and maxims of judicial interpretation; let us pass to the second question, viz.: In the enforcement of the terms and conditions of these treaties by the courts, to what class of laws do they belong, and what rules of construction are applicable to them?

In the case of *U. S.* v. *Watts*, cited *supra*, the defendant was extradited from Canada, under and in conformity with the terms of the Ashburton treaty, to be tried in the District Court; he was discharged for the offense for which he had been extradited, and the government then sought to try him for other offenses committed before his flight to Canada, but Judge HOFFMAN said it could not be permitted.

In his opinion construing the treaty the District Judge said:

"At the outset of this discussion, two propositions "may be laid down as incontrovertible. '*First*—Whatever speculative views may have been taken by jurists "of America as to the duty of sovereign States, on "grounds of comity, or by laws of nations, to deliver "up fugitives on demand of foreign States, whose laws "they are charged with having violated, in the United "States it has long been the established rule neither to "grant nor to ask for the extradition of criminals as between us and any foreign government, unless in cases "for which stipulations have been made by express convention;' (citing) 6 Op Att'y Gen. 431; *Com.* v. "*Hawes, supra;* Holmes' case, 14 Pet. (U. S.) 593; "Lawrence's Wheaton on Intn'l Law, 233."

U. S. v. *Watts*, 14 Fed. Rep. 130.

Therefore it may be regarded as settled that there is no rule of comity or international law regarding foreign extradition so far as the United States is concerned. "It is the established rule of the United States to neither ask nor grant extradition except there be a treaty."

Caleb Cushing in 6 Op. Atty's Gen'l, 431.

And it was in the face of this settled rule, and line of authorities, that the Supreme Court of Illinois declared in the case at bar:

"Where no treaty exists no obligation that can be insisted upon exists to surrender criminals for trial to the government from which they have fled, but as a matter of comity between friendly nations great offenders are usually surrendered on request from the government claiming the right to try them." (Appendix p. 11).

And again, "Whether a nation will surrender a fugitive from justice that seeks with it an asylum is a question of national comity resting in discretion." (Appendix p. 14.)

It is urged in behalf of plaintiff in error that the foundation of the erroneous ruling of the Supreme Court of Illinois is based upon the claim set up in the opinion, as shown above, that foreign extradition is a matter of *comity*.

As declared by Judge HOFFMAN, *supra*, foreign extradiction is a matter of *law*, and such being the case it would seem clear that this treaty is a law making a remedy for jurisdictional purposes where there was none before, and providing a manner of enforcing the remedy; and completely within the well known rule—

"It is a maxim, generally true, that if an affirmative "statute, which is introductive of a new law, direct a "thing to be done in a certain manner, that thing shall "not, though there are *no negative words*, be done in "any other manner."

Potter's Dwarris on Stat. 72, and authorities there cited.

This supreme law says, that persons charged with crime are to be "delivered up to justice." Not in all cases of the classes named, however, the language is "that the persons charged with the crimes hereinafter mentioned *should under certain circumstances* be reciprocally delivered up." How? First, upon requisition; second, through the medium of diplomatic agents; third, for certain crimes; fourth, *only* where the fact of the commission of the crime shall be so established as that the law of the country in which the person is found would justify his apprehension and commitment for trial had the crime been committed there.

It being the intent of this treaty which is to be enforced, material assistance, aside from the language, may be gathered from the reasoning of the courts in the following cases:

Com. v. *Hawes*, *supra.*
Blandford v. *State*, *supra.*
U. S v. *Watts*, *supra.*
State v *Vanderpool*, *supra.*

The question presented in the *Hawes*, *Blandford* and *Watts* cases was simply: "Could a person be extradited for an offense within the treaty, and tried for a *non-extraditable* offense?" The question in *Vanderpool's* case was slightly changed: "Could a person be extradited for an offense within the treaty, and then be transferred to another county in the State and tried for an offense of the same kind, also within the treaty?" All of the courts answered *No.* In order to reach this conclusion each of the four courts declared the treaty to be a SUPREME LAW. That all its terms and conditions were to be enforced by the court. That it was to receive the same construction and treatment as a statute.

Mr. Justice SCOTT concludes that these cases of *Hawes*, *Blandford*, *Watts* and *Vanderpool*, cited *supra*, have no bearing upon this case, because they are not decided upon analogous facts. (Appendix p. 11.) In these four cases the status and construction of an Extradition treaty were the only questions involved, and the same is true of this case. In the cases cited, certain rules were laid down as to these extradition treaties, namely:

That these treaties were self-executing laws, and not mere executive compacts.

That such treaties were not subject to enforcement by the executive within its discretion, as a matter of government policy or good faith, but that all of their terms were to be observed and enforced by the courts as a paramount law.

That the rule "that an offender against the justice of his country gets no rights by flight," has no application to a claim of "right of asylum," acquired by reason of a Federal treaty with a foreign country.

That such "right of asylum" existed by virtue of the treaty, and not by reason of the flight.

That such right of asylum, absolute or conditional, is a personal right, which the accused may set up in the courts of this country to bar a trial which would evade or obstruct that right.

That the rights of the State over the accused, who had fled the State to a country with which our government had a treaty, were controlled by the terms, express or implied, of the treaty.

These are all abstract rules, which apply to every case, independent of particular circumstances, where the office or construction of a Federal extradition treaty is in question, and if they are true of the Ashburton and Mexican treaties, then they are true of the Peruvian treaty.

If after *Vanderpool* had fled the State of Ohio into Canada, the court having custody of his person had no jurisdiction to try him for a specific offense *named in the treaty*, but into which the Canadian authorities had not examined or consented that he might be tried, because the Federal government by its treaty had impliedly declared: "*That the accused was protected in his asylum unless the authorities there should find him guilty of one of the crimes named in the treaty*," and because "the rights of the State over the accused were governed by the terms express and implied of the treaty;" then upon what line of legal reasoning can it be concluded that there was *lawful* jurisdiction of this plaintiff in error, who like *Vanderpool* was in the custody of the court charged with an offense named in the treaty, but into which the Peruvian executive, the only authority which could *lawfully* oust his right of asylum under the treaty, had not examined as required by the Federal law, and had never consented to his being placed on trial?

If the well known maxim, that, "*Every rule is as broad as the reason for the rule*," is not obsolete, then the reasons declared by Chief Justice JOHNSON, for the rule in *Vanderpool's* case, govern the case at bar. True, the respective courts obtained the custody in different forms, but the manner in which the opportunity was given the prosecutor to evade the law can be of no consequence, for the law must be so practically construed that its intent shall be absolutely unavoidable.

In *Blandford's* case the Texas Court of Appeals said:

"It is seen that the treaty enumerates eleven well de-"fined crimes for which a party may be extradited, and "stipulates that the party shall be delivered up to justice "who is accused of one of the enumerated crimes, pro-"vided that this shall be done *only* when the fact of the "commission of the crime shall be so established, as "that the laws of the country in which the fugitive shall "be found *would justify his apprehension and commit-"ment for trial if the crime had been there committed.* "Why this specific enumeration of the crimes, this pro-"viso? Does not this enumeration evidently exclude "crimes not named therein, if not, why enumerate? If "the maxim '*expressio unius, est exclusio alterius*' does "not apply here, it can never be applied to an act of "either Congress or the State legislature. It would be "a useless antiquated maxim, and should be expunged "from legal literature. To hold that it has no applica-"tion in this treaty, would render treaties a snare and a "delusion, a farce and a solemn fraud. This treaty neg-"atives by imperative necessity as patent as that there is "life in nature, the right to extradite only for crimes "named in the treaty, *and not then, until after an exam-"ination into the charge by the authorities of the govern-"ment upon which the demand is made;* the charge "named in the treaty or one of them, and contained in "the requisition."

Blandford v. *State*, 10 Tex. Ct. Appls. 637.

In the *Hawes* case Chief Justice LINDSAY said:

"It will be seen that the trial and punishment of the "surrendered fugitives for crimes other than those men-

"tioned in the treaty *is not prohibited in terms*, and that "fact is regarded of controlling importance by those "who hold to the view that Hawes was not entitled to "the immunity awarded him by the court below; but if "the prohibition can be fairly *implied* from the language "and general scope of the treaty, considered in connection "with the purpose the contracting parties had in view and "the nature of the subject about which they were treating, it is entitled to like respect and will be as sacredly "observed as though it was expressed in unambiguous "terms. *Public treaties are to be fairly interpreted, and "the intention of the contracting parties to be ascertained by "the application of the same rules of construction and "the same course of reasoning, which we apply to the "interpretation of private contracts.*"

Com. v. *Hawes*, 13 Bush. (Ky.) 700.

Chief Justice JOHNSON, of Ohio, having the advantage of the other opinions, and the reason of the rule laid down in them, is much clearer than any of the others; he says in *Vanderpool's* case, *supra:*

"Prior to, as well as since, the treaty of 1842, it has "been the settled policy of both the United States and "Great Britain, to furnish an asylum for persons charged "in other States with religious or political offenses. "Each zealously vied with the other in maintaining this "right of asylum. Hence it was that the treaty of 1842 "was expressly limited to seven well-defined crimes. "Hence it was, also, that the right to demand a surrender in the specific cases named was so carefully guarded. "*The accused was protected in his asylum unless the authorities there should find him guilty of one of the crimes "specified in the treaty.*"

Upon the rules for construing the treaty he says:

"This treaty is to be subject to the same rules for ascertaining the intention of the contracting parties, as "in case of other contracts."

The Chief Justice then virtually applies the maxim *expressio unius, est exclusio alterius* to the treaty. And that it limits the duty of surrendering to cases where the evidence is sufficient according to the law of the surrendering government, and remarks:

"The right of the nation where the fugitive is found "to first hear and determine the case, and to decide "upon the evidence, whether, according to its own laws, "the crime charged has been committed, that is, whether "a case for committal has been made out, secures to the "government upon which the demand has been made "the right to determine for itself whether the demand "shall be complied with.

"This necessarily excludes the idea that the demanding government can decide for itself to try the prisoner, "after obtaining custody, for other crimes; otherwise "the purpose of the treaty is defeated.

"If the demanding government can so decide, the "whole intention of the treaty could be defeated, and "the right of asylum, which has been the boast of both "governments, would depend entirely on the action of "the demanding government."

And in the next clause of the opinion the Chief Justice refers to the "*violation of the right of asylum in "favor of the accused, guaranteed to him by the treaty* "

The legislation of Congress upon this question of extradition is then referred to, and he says: "The right "of the State of Ohio over the accused, who had sought "an asylum in Canada, is derived from the provisions, "express or implied, of the treaty of 1842.

"In view of the provisions of this treaty, the safe-"guards therein provided against the infringement of "the *right of asylum*, save in the specified cases, and "the legislation by both governments, to carry out those "provisions, we think it clear that the court below did "not err in refusing to put the accused on trial for a "crime for which they were not extradited."

This is simply the position taken here. That the rights of the State of Illinois over Ker were governed by the terms, express or implied, of the Peruvian treaty, and when that treaty provided for his extradition in a certain mode, to be tried for a specific offense, his personal presence here, without his consent, gives no right to try him for a crime for which he has not been extradited.

Now, if it is true, as declared in the case last cited: "That the sole object of the treaty was to enable each "government to protect its citizens and inhabitants in "the right of asylum, *except they came within the provi-"sions named*," it seems obvious that that intent is to be enforced at all times and under all circumstances.

And if it is true that it is the intent of this treaty that: "*The accused was protected in his asy-"lum, unless the authorities there should find him "guiltv of one of the crimes specified in the treaty*;" then it was the intent of the makers of the treaty, that no man should be taken out of either country to be tried in the other until the country of his domicile had granted permission to the other country to submit him to jurisdiction.

It is upon the authority of these cases and the reason of the rule there laid down that it is insisted that it is the *intent* of an extradition treaty to make a RIGHT OF ASYLUM.

That this right of asylum is of two kinds, *absolute* and *conditional.*

That an *absolute* right of asylum exists to the offender for all political and religious offenses, and all other offenses not specifically named in the treaty. If this be not so, then in the language of the Texas Court of Appeals:

"Why this specific enumeration of the crimes, this "proviso? Does not this enumeration evidently exclude "crimes not named therein, if not, why enumerate? If "the maxim '*expressio unius, est exclusio alterius*' does "not apply here, it can never be applied to an act of "either Congress or the State legislature. It would be "a useless antiquated maxim, and should be expunged "from legal literature. To hold that it has no applica-"tion in this treaty would render treaties a snare and a "delusion, a farce and a solemn fraud."

Blandford v. *State, supra.*

Therefore when the contracting parties declared that men might be taken out of Peru, under certain circumstances to the United States, to be tried for certain crimes, the contracting parties thereby declared, by necessary implication, that men should not under any circumstances be taken out of Peru, to be tried in the United States, for any other crimes than those named.

The *conditional right of asylum* existed as against the crimes *named* until the conditions precedent were observed.

When the contracting parties declared that men should "*under certain circumstances*" be taken from Peru to be tried for crimes in the United States, but *only* upon certain precedent conditions, the contracting parties thereby declared by necessary implication that men should not be taken out of Peru to be tried for certain specified crimes, except under certain circumstances, and then only upon the performance of these conditions precedent. Such seems to be the opinion of the Texas Court of Appeals when they say: "This "treaty negatives by imperative necessity as patent as "that there is life in nature, the right to extradite only "for crimes named in the treaty, *and not then, until after* "*an examination into the charge by the authorities of the* "*government upon which the demand is made;* the charge "named in the treaty or one of them, and contained in "the requisition."

Blandford v. *State, supra.*

Now as this treaty inhibits the right to extradite—to deliver up to justice—lawfully, without obeying these provisions, it necessarily inhibits the right to kidnap—to deliver up to justice—unlawfully, without obeying these provisions.

As Chief Justice JOHNSON says: "*The accused was* "*protected in his asylum unless the authorities there* "*should find him guilty of one of the crimes specified* "*in the treaty.*"

Vanderpool v. *State, supra.*

"The treaty is the supreme law of the land and as "binding upon the court as a statutory enactment. If "it contained an express prohibition the court would "beyond doubt be deprived of jurisdiction. If by a "just and reasonable interpretation the prohibition must "be implied, the result is the same."

U. S. v. *Watts, supra.*

Now the Supreme Court of Illinois (whose opinion upon this question by Mr. Justice SCOTT is made an appendix to this brief) tacitly admit that the absolute right of asylum for crimes not enumerated, exists by reason of this treaty. In other words, Justice SCOTT concludes, that to that extent the intent of the treaty ought to be enforced. But, presumably, having failed to examine or remember the treaty—for no syllable of it can be found in the opinion—the eminent jurist fails to consider the expression or intent of the treaty as to the conditions therein made Justice SCOTT does not seem to appreciate the proposition that if one part of this treaty is to be enforced then all of it is.

"The protection of the whole implies necessarily the "protection of its organized parts, and the whole cannot "be secure while all or any of its parts are exposed to "danger."

People ex rel. v. *Mayor of Chicago*, 51 Ill. 31.

Mr. Justice SCOTT says: "As to the crime of larceny with which the defendant was charged he could have no right of asylum in Peru, as that is one of the crimes enumerated in the treaty and what right secured by treaty was violated *when he was arrested either with or without due process of law*. The accused was subject to extradition at any time under the treaty and what difference can it make in law as to the right of a State court to try defendant for an extraditable crime *whether the existing treaty was in fact observed in all its forms?*" (Appendix p. 10.)

The answer is obvious. How does Justice SCOTT know that the specific crime of larceny for which the extradition of Mr. Ker was asked, would have been any crime against the laws of Peru, or that the evidence of criminality would have been considered sufficient in that country to have committed him for trial? *Without these things he was not subject to extradition for larceny.*

More particularly is this question pertinent when this record and the opinion disclose, that when Mr. Ker was tried here, the jury refused to convict him of larceny, but convicted him specially upon the embezzlement counts of the indictment.

On the authority of the Supreme Court of Ohio in Vanderpool's case, *supra,* it may now be considered the settled law of this country that a person cannot be extradited under the terms of a treaty for a specific offense and tried for any other offense, whether extraditable under the treaty or not. In each of the cases of *Hawes*, *Blandford*, *Watts* and *Vanderpool*, various reasons are used in support of this rule, in subtance; that if such a thing was permitted, our courts might try the party for a non-extraditable crime, or a political offense, for which the treaty-making powers intended he should never be delivered up to justice. Or we might try him for an offense which we would consider simply a crime within the treaty, but which the authorities of the other country would consider political or not within the treaty. Or we might try, and convict, upon evidence which the other government would consider utterly insufficient to establish a crime, or to commit for trial. And it is declared that no opportunities for any such things as these should occur. That such is the *intent* of the treaty, and that to violate this *intent* was to TRANSGRESS THE SUPREME LAW OF THE LAND. The Watts case,*supra*, is very full on this proposition.

But it is insisted that this intent of the treaty-making powers, "*That the government where the man is domiciled shall first examine into the facts and say whether the other government shall get him for trial,*" can be completely evaded by the process of kidnapping, and that the court will close its eyes to the rights of the defendant under the supreme law, and open them only when it inspects the criminal code and the indictment, notwithstanding the law that:

"A cardinal rule in dealing with written instruments "is that their practical construction shall be uniform."

Cooley's Const. Lim. 54.

Now, look at the principle of the case at bar in another light.

One of the extraditable crimes named in this treaty is murder.

Such is the well known difference between the law of self defense in the two States, that a killing, which would be justifiable homicide on the ground of self defense in Tennessee, would be murder in Vermont. The law of self defense in Peru and Tennessee may be the same. Suppose a citizen of Tennessee sojourning a few weeks in Vermont kills a man there, under circumstances which would be justifiable homicide at his home, and then escapes to Peru, he knows that he cannot be lawfully extradited, for the treaty provides expressly: "That this shall only be done upon such evidence of criminality as, according to the laws of the place where the fugitive or person so charged shall be found, would justify his apprehension and commitment for trial if the crime or offense had been there committed," and consequently his right of asylum is complete; for he cannot be extradited for any other crime and tried for murder. But the relatives of the deceased are wealthy and influential and they send a detective after him,—who gets into the country by virtue of a president's warrant, or without it,—and makes arrangements with the United States navy department, (for we learn from this case that such things can be readily done,) to have a man-of-war bring the accused out of his asylum when kidnapped. When he is here the courts reply to his protest: "We won't look into the mode by which we have received you, to see whether your rights under our supreme law were violated or not." What becomes of the *command* of the constitution to the court to enforce this treaty? In the light of the intent of the treaty, is the right of asylum against trial for murder in Vermont, until the Peruvian authorities had examined into his case and consented to his removal, any less or greater under such circumstances than though the man had first been lawfully extradited for larceny? The proposition would seem to answer itself.

If the law makers had intended, that any mode in which a man charged with one of the offenses within the treaty, was gotten back for trial, should be sufficient, why did they not say so, or easier still, leave out these conditions precedent?

This federal law has vested in the Peruvian diplomatic authorities the sole and exclusive power of destroying or ousting the conditional right of asylum declared in the law, and are we permitted to suppose that when these high powers placed these safeguards and provisions between a fugitive in Peru, and jurisdiction here—that the contracting parties intended that *he should be submitted to jurisdiction in any other way?*

Now in order that the State may retain the advantage had by reason of the evasion of this treaty, the proposition is urged by the State Supreme Court, that the Federal Government has violated no treaty in this matter, and that if the State authorities have done so they acted as individuals, and that their acts can not be set up against the State. This court will readily recognize the proposition that the Federal *Government*, being the war-making power, cannot violate a treaty, "*The King can do no wrong*." The very act by which the Federal *Government*, as a *Government*, should nullify a treaty, would cease its existence, and, therefore, Federal officers, as officers, cannot violate a treaty.

But it was early settled in the jurisprudence of this country, that this rule did not apply to the States, or to State officers. Upon this the court is referred to *Holmes* v. *Jennison, Governor of Vermont*, 14 Peters, (U. S.) 593. This was a writ of error, prosecuted to review the finding of the Supreme Court of Vermont, remanding Holmes upon *habeas corpus*. Holmes had fled from the justice of Canada to Vermont; the Governor issued a warrant, commanding the sheriff of Washington county to arrest and deliver him to one Brown, the agent of Canada. Upon *habeas corpus*, Van Ness, for *Holmes*, urged that this warrant was void, as being in contravention of the Federal constitution's inhibition against any State making a treaty or agreement with any foreign power. The State court held that the warrant was good under the laws of Vermont.

Upon error it was urged for the State that the action of the Governor was the exercise of a police power; that there was no treaty or agreement between Canada or Vermont; that if there was any agreement it was simply an agreement between the authorities, and therefore it was the agreement of individuals and not of the State; therefore not within the inhibition. There was a division in this court upon the right to entertain the writ of error, but Chief Justice TANEY, supported by

Justices M'LEAN, STORY and WAYNE, rendered an opinion, which was afterwards adopted by the Vermont court, and Holmes discharged.

Among other things, Chief Justice TANEY, says: "It must be remembered that States can act only by "their agents and servants, and whatever is done by "them by authority of law, is done by the State itself. "The Supreme Court of Vermont, as we have already "mentioned, has decided that the warrant of the Governor, and the detention of Holmes under it, are "authorized by law, consequently the seizure for the "purpose of delivery, the agreement on the one side to "deliver and on the other to receive, is an agreement "made by the authorized servants of the State, and of "course in contemplation of law made by the State itself. * * * Every one will admit that an agreement formally made to deliver up all offenders who, "after committing crimes in Canada, fly to Vermont, "would be unconstitutional on the part of the State. "So of an agreement after Holmes had escaped to Vermont, between the provincial authorities and the Governor, engaging to deliver up Holmes. *Yet precisely* "*the same thing has been done in this case without any* "*regular or formal agreement.* * * *Can it be supposed that the constitutionality of the act depends on* "*the mere form of the agreement?* We think not; the "constitution looked to the essence and substance of "things and not to mere form. It would be but an "evasion of the constitution to place the question upon "the formality with which the agreement was made."

Holmes v. *Jennison, etc.*, 14 Peters, 572.

The sole reason for the rule in the cases of *Hawes, etc.*, was that the supreme law would not permit the accused to be tried for an offense into which the government of the domicile had not examined, and for which he had not been delivered up by that *government.*

Yet precisely that thing has been done here. Does the life of the treaty, the very essence of it—*the consent of the other government to try for the specific offense*—depend upon the mere form of the delivery? Or does the treaty reach the substance and not the mere form? If so, it is the intent to inhibit a trial for every or any offense, until the diplomatic authorities of each government have in the *first instance* passed upon the rights of the accused, and the government of the domicile has found the accused no longer entitled to his asylum under the treaty.

"*The law looks to the substance of things.*"

Now permit brief consideration of the grounds upon which the Supreme Court of Illinois reaches its conclusion that the express and implied conditions of this treaty do not apply to this case.

The Supreme Court of Illinois was asked to *construe* the language of this treaty, and under such circumstances the following facts are considered worthy of notice:

FIRST. *The opinion contains no single word or syllable of the treaty.*

SECOND. *The opinion fails to remark any single rule or maxim of construction which was suggested as applicable to the treaty.*

THIRD. *The opinion fails to mention either the language of the Federal constitution, or any of the language or reasoning of the respective courts in the cases of Hawes, Blandford, Watts and Vanderpool, cited supra, regarding the status and office of these treaties.*

Thereupon, following in the footsteps of detective Julian, the Supreme Court of Illinois, utterly ignoring this treaty and every principle connected with it, bases its opinion upon what it declares to be, a settled rule of law, viz.: "That an offender against the justice of his "country gets no rights by his flight; that between the "offender and the justice which he has offended no "rights accrue to the offender by defrauding that justice. "But he remains at all times liable to trial when he shall "come within the reach of that justice."

In support of this rule the Illinois court cites several cases which may properly be classified under four heads:

First. Cases where the defendant had been kidnapped from a foreign country and carried into England, and there charged with crime.

Second. Cases where the defendant had been kidnapped in Canada and brought into one of the United States, and there charged with felony.

Third. Cases where the defendant had been kidnapped in one State and taken into another, and there charged with felony.

Fourth. Cases where the defendants having been properly extradited pursuant to treaty into the United States, set up the same claim as did *Hawes*, *Blandford*, *Watts* and *Vanderpool*, and the claim was repudiated by the court.

As the Supreme Court of Illinois applied this rule, and these authorities, to this case, where a law of the *forum* was set up as a basis of exemption, it is only proper to carefully examine the cases and see what they determine and how far they should be permitted to govern here.

Of the first class of cases are, *Rex* v. *Marks*, 3 East.

175; *Kraus'* case, 1 Barn. & Cres. 238; *Scott's* case, 9 Barn. & Cres. 446.

These cases are all the same in principle and circumstances and can be disposed of by reference to the case last cited.

"In *ex parte* Susannah Scott, the prisoner was brought from Brussels by a police officer into England, without authority, and on account of this trespass upon her, asked for her discharge. Lord TENTERDEN, C. J., said: 'The question is this, whether if a person charged with crime is found in this country, it is the duty of the court to take care that such a party shall be amenable to justice, or whether we are to consider the circumstances under which she was brought here. I thought, and still think, that we cannot inquire into them. If the act complained of were done against the law of a foreign country, that country might have vindicated its own law.'" 9 Barn. & Cress. 446.

Suppose that in this case last cited, Lord TENTERDEN had had before him a *law* of England providing that Scott could be brought from Brussels for only certain offenses to be tried in England, and then *only* upon the performance of certain precedent conditions by the government, would he not have required the enforcement of that law before a plea, just as he would have required an indictment and arraignment before plea? But there was no such *law* as this of ours in England; therefore, *Susannah Scott's* challenge was of no use—there was no law upon which to base it; she attempted to evade trial by setting up a trespass committed upon her person against the law of Belgium; *Hawes*, *Blandford*, *Watts*, *Vanderpool* and *Ker*, because the provisions of a *supreme law of this government* were being evaded and ignored in their delivery up to justice for the specific offense.

But the Supreme Court of Illinois refuses to see the distinction between the law governing the two cases and fails to remember that:

In dissimilars the rule is dissimilar.

Of the second class of cases cited by the Illinois court is:

State v. *Brewster*, 7 Vt. 118, decided in 1835. Here the question of asylum and the rights of a person to be exempt from forcible arrest beyond the jurisdiction of the court (in Canada) were passed upon, but there was no treaty with England at this time to engage the attention of the court. And, also,

State v. *Rowe*, 7 Park. Crim. Rep. 253, decided in 1858 by the Superior Court of Buffalo. The sheriff made an agreement with parties in Canada, pursuant to which Rowe was kidnapped in Canada and brought into the jurisdiction. The extradition treaty is not even mentioned, and the court after overruling Rowe's plea *based upon the violation of his rights under the laws of Canada*, say: "No offense against the laws of this State, *nor of the United States*, was, so far as we can discover, perpetrated by the arrest" *Quere:* Had the court looked at the Ashburton treaty, and understood it as it is declared by Chief Justice JOHNSON in Vanderpool's case, *supra*, would it have decided as it did?

To speak of these two cases then in connection with a case where the express language of a federal treaty is set up, seems too much out of place to need comment.

The third class of cases is where the kidnapping was from a sister State.

In Dow's case, 18 Penn. State, decided in 1852, the

Brewster case, *supra*, and the various English decisions were cited, and the court sustained Dow's conviction, an extradition application having been issued and the Michigan executive having granted a warrant, but the parties arresting Dow in Michigan not being the proper State agents.

In Smith's case, 1 Bailey, (S.C.) 283, decided in 1829, Smith was indicted for slave stealing and was kidnapped in North Carolina, and was brought into the jurisdiction; and the court held that a violation of Smith's person or rights under the law of North Carolina could not be set up, and that it was a question between the States.

In *State* v. *Ross*, 21 Ia. 467, decided in 1866; here the defendants were taken from Missouri into Iowa without any warrant and arrested by the sheriff, and the Supreme Court held that the manner of their arrest made no difference, and again we find these English cases cited as authority.

In the matter of Noyes, 17 Al. L. Jour 407, decided in 1878, Noyes' extradition was asked for and granted between the proper authorities of New Jersey and District of Columbia, he submitted himself to the jurisdiction by plea of " not guilty " in the New Jersey court, and afterwards asked U. S. Dist. Judge Nixon for a discharge on *habeas corpus*, on the ground that the indictments did not set out any crime. As his petition did not come within any of the causes of the *habeas corpus* act, he was remanded But the judge cited the same English cases, viz.: *Rex* v. *Marks*, 3 East. 175; Kraus' case, 1 Barn. & Cress. 238; Scott's case, 9 Barn. & Cress. 446, and the cases *supra* in this country, and took occasion to say that a party may be detained by the State whether his arrest upon extradition proceedings was legal or not.

Now, in applying the law as laid down in these cases of inter-state kidnapping to the case at bar, the Supreme Court of Illinois simply overlooked the vast difference between the inter-state extradition law and this treaty. This difference is pointed out by Judge HOFFMAN as follows:

"All the citizens of the States are citizens of the "United States. They are in no sense aliens to each "other. The distribution of powers between the State "and Federal governments requires, that offenses against "State laws should be prosecuted within the jurisdiction, the laws of which have been violated, *but no* "*right of asylum is gained by flight into another State.*"

After quoting the inter-state extradition law, he says: "*As the fugitive may be demanded for any crime* and as "the surrendering State *has no power to inquire into his* "*probable guilt, or whether the crime for which he is* "*demanded is made such by its own laws*, it follows that "when surrendered, he may be tried for any crime he "may have committed. But that fact lends no countenance whatever to a similar claim on the part of the "receiving power under an extradition treaty with a "foreign nation."

U. S. v. *Watts, supra*

And the same rule is laid down by the court which discharged Blandford.

Ham v. *State*, 4 Tex. Ct. Appls. 647.

The fourth class of cases is composed of the opinion of Judge BENEDICT in the cases of *Lawrence* and *Caldwell*, and of CHURCH, C. J., giving the opinion of a majority of the New York Court of Appeals in *Adriance* v. *Lagrave*.

In *U. S.* v. *Caldwell*, 8 Blatchf. C. C. R. 131, decided by Judge Benedict in January, 1871, Caldwell was properly extradited from Canada in 1879 upon a charge of forgery; for which he was never tried; but was tried and convicted in the United States Court for bribing a public officer, which was not an extraditable offense under the treaty with England. He pleaded to the jurisdiction, claiming that he could only be tried for the offense for which he was extradited. The District Judge in overruling his plea held: "I am of the "opinion that the relief could not be granted, for the "reason that the person of the prisoner is not within the "jurisdiction of the United States by virtue of any war- "rant issued out of this or any court. The prisoner "was brought by the executive authority of a foreign "government, upon the demand of the executive de- "partment of the United States; *and while abuse of ex- "tradition proceedings and a want of good faith in re- "sorting to them, doubtless constitutes good cause of com- "plaint between the two governments, such complaints do "not form a proper subject of investigation in the courts.*" * * * * "But whether extradited in good faith or "not, *the prisoner is in point of fact within the jurisdic- "tion of the court, charged with a crime therein com- "mitted*, and I am at a loss even for a plausible reason for "holding upon such plea as present, that the court is "without jurisdiction to try him."

This is precisely the doctrine urged by Mr. Justice SCOTT here. Ker is within the jurisdiction, and nothing regarding the mode of bringing him will be listened to.

The District Judge concludes as follows:

"And I cannot say that the fact that the defendant "was brought within the jurisdiction by virtue of a war-

"rant of extradition for forgery, affords him a legal exemption from prosecution for other crimes by him "committed."

Another case, also, by Judge Benedict, is *U. S.* v. *Lawrence*, 13 Blatchf. C. C. R. 295, decided March, 1876. The circumstances were the same as Caldwell's case, except that the defendant was surrendered by England, and was never tried for anything. Remarking that the question had been settled in the Caldwell case, *supra*, the court said: "*This ground of defense is*, "*therefore, dismissed*, with the remark that *an offender* "*against the justice of his country can acquire no rights* "*by defrauding that justice.* Between him and the jus-"tice he has offended, no rights accrue to the offender "by flight."

In *Adriance* v. *Lagrave*, 59 N. Y. 110, decided in 1874, by the N. Y. Court of Appeals (Grover and Folger, J. J., dissenting,) Lagrave was extradited from France for burglary in the third degree, under the N. Y. statute. When he arrived in New York, divers civil capias were served upon him. The general term of the Superior Court quashed all of these writs, holding that Lagrave's extradition was unlawful from beginning, and that the extradition treaty could not be used for private purposes; and that Lagrave obtained rights under the treaty which prevented any use being made of his person, except for the extradited offense. (4 N. Y. S. C. (T. & C) 215.) But the Court of Appeals held upon the authority of the Caldwell case, *supra*, and the opinion of the French Minister of Justice, that there was nothing implied in the treaty to protect Lagrave from other prosecutions than the one for which he was extradited.

It will be noticed that in none of the three cases last cited is any attempt made to give construction to any of the terms of the treaty. Judge BENEDICT holds that he can not look into the treaty. And Chief Justice CHURCH says that the implied provision contended for is not in the treaty. Holding that: "The right of exemption from prosecution, if it can be said to exist at "all, is based upon the good faith of the government, which is necessarily uncertain, and is a political "and not a judicial question."

Adriance v. *Lagrave, supra.*

These three cases last cited were each carefully considered by the courts in the respective cases of *Hawes, Watts* and *Vanderpool, supra*, and the six cases are entirely analogous in both fact and law. And in the *Hawes, Watts* and *Vanderpool* cases the courts refused to be guided by these opinions of Judges BENEDICT and CHURCH, for the all-sufficient reason that in order to do so the language of the federal constitution commanding the court to enforce the treaty would have to be ignored.

Mr. Justice SCOTT in the case at bar was entirely consistent with Judges BENEDICT and CHURCH in two things at least,—failing to mention or pay any attention to the federal constitution making this treaty a supreme law and commanding him to enforce it, and in refusing to look into the treaty or say what it meant. But Justice SCOTT is not entirely consistent with Judge BENEDICT, who said in *Lawrence's* case, *supra:* "I am of the opinion that the relief (the right to be discharged under the "treaty) could not be granted, for the reason that the "person of the prisoner is *not* within the jurisdiction of "the United States by virtue of any warrant issued out "of this or any court."

Lawrence, like Hawes, Blandford, Watts and Vanderpool, had been brought on extradition. But Justice SCOTT declares that relief can not be given in the case at bar because Ker *is* here by virtue of the court's capias, and not by virtue of lawful extradition proceedings.

It is upon these cases where Judges BENEDICT and CHURCH skipped over both the constitution and the treaty to get back to Lord TENTERDEN'S rule that Mr. Justice SCOTT declares in the case at bar: "It is sufficient that the defendant is in court to require him to "answer the indictment against him." This was good law in England, for there was no *law* concerning the delivery of *Susannah Scott* up to justice. And had there been a treaty of extradition between England and Belgium Lord TENTERDEN could not have enforced its provisions in *Scott's* case. An English court cannot notice any kind of a treaty, for under their system of jurisprudence, treaties, and their conditions and subjects, are diplomatic entirely, and not paramount law as with us.

Spear on Extradition, 95.
Foster v. *Nilson, supra*
Com. v. *Hawes, supra*.

The rule was good law in the cases of Inter-State kidnapping, for none of the provisions of, or rules applicable to a treaty, are concerned in the Inter-State Extradition Law, so far as *crimes* are concerned

U. S. v. *Watts, supra*.
Ham v. *State, supra*.

But as is apparant, if this rule can be applied as against the supreme law, *Hawes*, *Blandford*, *Watts* and *Vanderpool* could have done nothing but plead guilty or not guilty to the several indictments against them.

The extradition process upon which the respective parties last named were severally brought into Kentucky, Texas, California and Ohio, was no part of the court record, either in the case for which the extradition was made, or in the case where the challenge to the jurisdiction was interposed. In each of these cases where the answer to the indictment was a claim of right of asylum under a treaty of the United States the several courts were obliged to and did go outside of the record, and behind the capias, to find how the defendant was held And in each of these cases bearing the language of the constitution and Chief Justice MARSHALL on their face, the court denounces this rule of Lord TENTERDEN when it is set up against the treaty.

"The legal right of a judicial tribunal to exercise jur-"isdiction in a given case, must from the nature of "things be open to question at some stage of the pro-"ceeding, and we find it difficult to conceive of a "person charged with crime being so situated as not to "be permitted to challenge the power of the court as-"suming to try him."

Com. v. *Hawes*, *supra.*

The command of the constitution to the court to enforce the treaty necessarily includes a command to the court to examine into the facts to which it is claimed the provisions of the treaty apply. For it is axiomatic that no law can be applied or enforced until a certain state of facts is first proved or admitted.

The only way in which Justice SCOTT could evade applying the *intent* of this treaty to this case, was to go back to Lord TENTERDEN'S rule and refuse to examine into the facts upon which the claim of plaintiff in error was founded.

Mr. Justice SCOTT has too much veneration for the constitution to declare, as Judge BENEDICT did, that abuse of extradition proceedings was a matter to be settled solely between the two governments. But if the agent of Illinois to procure the delivery can evade the requirements of the treaty, then Justice SCOTT will give the State the full benefit of the evasion of the law, by refusing to examine into the facts to see whether Mr. Ker was in court in the manner provided by the treaty or not.

It is respectfully submitted that such conduct on the part of a court of last resort is exceedingly dangerous.

"To violate the *spirit* of the law, by pretending to "respect the letter, is a fraud no less criminal than an "open violation of it. It is no less contrary to the in-"tention of the legislature, and only shows a more art-"ful and deliberate malice."

Vattel's 23rd Rule.

This absolute right of asylum for offenses not named and this conditional right of asylum for offenses named, until condition performed, cannot be juggled or frittered away by a rule established in England, where such a law as this was never heard of, and followed in America where such a law was either unheard of or inapplicable.

"What tends to render an act null and without effect, "either in whole or in part, and consequently anything "that introduces any change in that already agreed "upon, is odious."

Vattel's 30th Rule.

When the right to get a man in a foreign country depended only upon national comity, as between England and Belgium, get him as best you can, but when there is no such thing as comity between the United States and Peru, and the whole matter is governed by a treaty which is a paramount law in our courts, then he must be obtained in the way provided, because "an obligation "imperfectly mutual gives place to one perfectly mutual "and binding on both sides."

Grotius' Rules, (Potter's Dwarris, 134.)

WHERE WAS THIS TREATY AND THE PLAINTIFF IN ERROR'S RIGHT OF ASYLUM UNDER IT VIOLATED?

The treaty was not violated by a simple kidnapping and bringing of plaintiff in error to Cook County any more than it would have been violated by his simple kidnapping and removal to England. But this treaty and the right of asylum under it was violated when the *substance of the treaty was ignored.* The substance of the treaty is a mode for obtaining jurisdiction to prosecute for crime.

The right to remain in Peru until the treaty was complied with by the State through the general government is a mere incident to the right of asylum. The right to be *exempt from punishment until the treaty is complied with* is the substance of the right of asylum.

"The sole object of the treaty was to enable each "government to protect its citizens and inhabitants in "the right of asylum, except they came within the pro- "visions named." JOHNSON, C. J., in Vanderpool's case, *supra.*

And therefore it was the prosecuting officers, and the Criminal Court of the State, who violated this treaty, when they accepted and approved the act of the kidnapper and brought Mr. Ker to trial, when by the plea and demurrer it was admitted that his right of asylum against prosecution for the specific offense had neither been waived by him nor ousted by the State in the mode provided by law—the law above all others which it was the duty of the prosecuting officers to respect and of the court to enforce.

Mr. Justice SCOTT says in the opinion here: "It is "not perceived how an irregularity in the capture and "return of a fugitive from the justice of the State can "secure him immunity from prosecution for crime, "whether it is one for which he might be lawfully ex-"tradited under any public law or not." (Appendix p. 9.)

If Mr. Justice SCOTT had looked at the admitted facts set out in this plea and then read this treaty would he not have perceived that there was no *irregularity* in the capture and return of Mr. Ker, and that the manner in which his presence for trial had been procured was a mode utterly at variance with the mode provided and intended by treaty?

Mr. Justice SCOTT evidently did not understand that it was his duty to declare and enforce the treaty upon precisely the same rules as a State statute of the same class.

Had he so understood his duty he would not have hesitated to put the language of this treaty into his opinion and to have declared—what is considered very good law in Illinois—that: "It is a rule of interpreta-"tion that such construction ought to be put upon a "statute as may best answer the intention the makers "had in view; and also that a *statute ought to be so con-*

"*strued that, if it can be prevented, no clause, sentence*
"*or word shall be superfluous, void or insignificant.*"

Decker v. *Hughes*, 68 Ill. 41.

And further that: "It is a familiar principle, where a "statute points out a particular course to be pursued to "effect a particular purpose, no other course can law-"fully be pursued."

Hardin County v. *McFarlin*, 82 Ill. 139.

Mr. Justice SCOTT would not say that this treaty was a law at all or that the *construction* contended for did or did not apply to it, or that the conditions shown were expressed in the law. He says in the opinion regarding the construction contended for: "No reason aris-"ing out of any public exigency or any consideration as "to the liberty of the citizen requires the adoption of "any such doctrine into the jurisprudence of the State."

Has the Supreme Court of Illinois the right to say whether the law governing the rights of men, and their asylum in, and removal from a foreign country to stand trial shall or shall not be "adopted into the jurisprudence of the State?" Has the federal constitution not put this treaty "into the jurisprudence of the State;" and that being so, is not every maxim and rule of construction which applies to, and necessarily goes with the treaty also in the "jurisprudence of the State?" Are the words and intent of this treaty to be enforced, according to the command of the constitution, by State courts, or are the courts to be permitted to set them all aside and refuse to either quote or declare them when they are set up, because the court can see no " public exigency " requiring obedience to the law?

Were not the Plenipotentiaries who settled the words and the governments which adopted them, with full knowledge of the meaning of the language they were using, the sole and exclusive judges of the necessity, the policy and the convenience? Is not Justice STORY'S rule the correct one?

"Arguments drawn from impolicy or inconvenience "ought to have little weight. The only sound principle is to declare *thus is the law written* to follow and "obey. Nor if a principle so just could be overlooked, "could there be found a more unsafe guide in practice "than mere policy and convenience? Men on such "subjects complexionally differ from each other; the "same men may differ from themselves at different "times. The policy of one age may ill suit the wishes "of another. The law is not to be subject to such "fluctuations."

Storey's Conflict of Laws, 17.

To evade any of the provisions of this law which the federal sovereignty had the right to make and has made, is to insult the sovereignty itself.

Chief Justice JAY said:

"The contracts of sovereigns or nations are made for the "benefit of the subjects or people; and, therefore, every "sovereign or nation is interested in every act which necessarily limits, impairs or destroys that benefit. Can "American citizens be divested of rights accruing to "them by treaty, and the American sovereignty remain "untouched?"

Jones v. *Walker*, 2 Paine, (Ct. Ct.) 700.

Therefore, it is urged, that when the Supreme Court of Illinois refused to put a syllable of the Federal constitution or of the treaty into its opinion in this case, and refused either to examine the reason for the rule laid down by the courts in Kentucky, Texas, California and Ohio, or to apply any single rule of judicial construction to this treaty, the said Supreme Court erred.

Mr. Ker has been delivered up to the justice of Illinois from Peru. Not upon any requisition. Not through the diplomatic authorities of either government, without any evidence adduced to the authorities of Peru, as to whether the offense of *larceny* upon which it was evidently intended to extradite him, would have been an offense against the laws of Peru if committed there. And to crown it all, the State which obtained his body by means of a kidnapping by the State's own agent, has him convicted, not of the *larceny* with which he was charged in the extradition warrant, but of the statutory crime of embezzlement, which Justice SCOTT confesses he could not have been tried for had he been lawfully extradited. The moral of which would seem to be that extradition treaties should only be used by State officers when necessary, for, when used, such proceedings are restrictive upon the rights of the State to prosecute for any but the extradition crime, but otherwise there is no restriction.

To better illustrate the principle contended for on behalf of plaintiff in error, let us suggest the rule in the case of Frank Cannon.

Cannon was extradited out of Kansas into Michigan under the inter-State extradition law to be tried for seduction, which is a crime in Michigan, but no offense in Kansas. After his removal into Michigan the charge of seduction was abandoned, and a charge of bastardy was preferred, and upon this last charge he challenged the jurisdiction. It was urged that having been lawfully extradited upon a charge of *crime*, he could be tried for any crime or misdemeanor, but bastardy was neither under the State statute, being simply a *quasi* criminal proceeding. That when the Federal constitution and the inter-State law provided for his delivery for "treason, felony or other crime," and said nothing about *quasi* criminal offenses or civil action, it was the manifest intention to exclude the right to get jurisdiction of him for these proceedings, and that consequently as to the *quasi* criminal offense of bastardy, he had a right of asylum in Kansas The Supreme Court of Michigan held that this claim was right, and that to try Cannon for bastardy would be to violate the constitution and inter-State law, which by necessary implication, intended that he should not be taken out of a sister State to be tried elsewhere for a *quasi* criminal offense.

Now, if Cannon, upon his return to Kansas, should be kidnapped and taken into Michigan, would it not be a violation of the same intent of the constitution, for the court to proceed to try him for the *quasi* criminal offense, which that *implied* intent declares jurisdiction shall not be obtained for?

In the case last cited it was said: "We do not think "the considerations involved in this inquiry have any "special connection with State pride or State comity. "The State of Michigan has no *legal power* to demand, "and the State of Kansas has no *legal power* to deliver "up, any persons but those charged as fugitive crimi-"nals. *The constitutional safeguards on this subject* "*concern the individual's liberty*, and not *merely the* "*State's dignity, and no one holds his liberty subject to* "*State comity, or on any less tenure than constitutional* "*right.*"

In re Cannon, 47 Mich. 485.

So it is here insisted that where the paramount law provides by implication that jurisdiction shall not be obtained at all, or if at all, then in a certain mode specifically pointed out; that such implied and express provisions are to be enforced by the courts, which under the constitution are bound by them, notwithstanding Lord TENTERDEN'S rule, or anything else in the constitution or laws of any State. And that when the State obtains jurisdiction of the fugitive, by either direct or indirect proceedings, by an evasion of either these express or implied provisions, such jurisdiction is not by "due process of law," and is in violation of the paramount law, because the *legal power* to surrender, demand or receive, is both *made* and *limited* by the provisions of the treaty, and not as Justice SCOTT insists, controlled by comity, or executive discretion.

OF THE INTERFERENCE BY THE GOVERNMENTS TO ENFORCE THE TERMS OF THE TREATY.

Judge BENEDICT in the Lawrence and Caldwell cases, Chief Justice CHURCH in the Lagrave case and Mr. Justice SCOTT, in the case at bar, all base their reason for refusing to enforce the terms of the treaty ,upon the proposition that the violation of the rights of the respective defendants under the several treaties was simply a violation of *international* law, of which none but the governments interested can complain; and that the several defendants are liable to prosecution until the executive branch of the government asserts its right to enforce the terms of its treaty. As has been seen, this doctrine was first declared in this country by Judge BENEDICT in the cases *supra*, and was followed by Chief Justice CHURCH. But it was so completely exploded by Chief Justice LINDSAY in *Hawes* case *supra*, and the contrary rule followed in the cases of *Blandford*, *Watts* and *Vanderpool*, that it is hard to understand how Mr. Justice SCOTT was willing to resurrect and follow it. It must be admitted that there is no express power given by the Federal constitution to the executive to go into any of the courts, either State or Federal, to enforce the terms of a Federal treaty. If the power suggested by Judges BENEDICT, CHURCH and SCOTT exists, then it must be an implied power. But it is axiomatic that no implied power can exist unless it is necessary to carry into effect some expressed grant of power. It is manifest that there is no such necessity for the implied power, and consequently no such implied power, when it is seen that the constitution goes directly to the courts and expressly commands them to enforce a treaty, anything in the constitution or laws of any State to the contrary notwithstanding. Chief Justice LINDSAY, referring to the *Caldwell* and *Lawrence* cases *supra*, and the theory that the executive alone can interfere, which he says is correct in England, as there the Crown can interfere through its officers, to the extent of preventing the violation of extradition treaties by the courts, says:

"But a different rule prevails with us, because our "government is differently organized. Neither the "State or Federal executive could interfere to prevent "nor suspend the trial of Hawes. Neither the commonwealth's attorney, nor the court, was to any extent "whatever subject to the direction or control of either "the President of the United States or the Governor. "*But the treaty under which the alleged immunity was* "*asserted being a part of the supreme law, the court had* "*the power and it was its duty, if the claim was well* "*founded, to secure to him its full benefits.*"

Com. v. *Hawes*, *supra*.

On this same subject Judge **HOFFMAN** said: "If the "protection of the fugitive be left solely to the political or "executive power, the attempt to afford it would, in the "United States, be attended by peculiar difficulties.

"In cases where the extradition has been obtained for "an offense against the laws of the United States, the "President could easily interfere by directing the district "attorney to abandon the prosecution. But when the "criminal has been surrendered for an offense against "the laws of a State, (as most frequently happens,) "neither he nor the Governor of the State has any such "power. The latter may pardon, but he cannot control "the district attorney or the court. In his correspondence "with Lord Derby, Mr. Fish declared his inability "to give the assurance demanded by the latter. If, "therefore, the immunity of the fugitive cannot be "enforced by the courts, it can in the United States be "effectively secured only by an amendment to the treaty "or by an act of Congress, as suggested by the Court of "Appeals of New York in the case heretofore cited. "But this, for reasons I have given, I believe to be "unnecessary."

U. S v. *Watts*, *supra*.

And on the same proposition Chief Justice **JOHNSON** says: " Again, if it be true, that the abuse of extradi-"tion proceedings under this treaty is an offense for "which the surrendering government can alone com-"plain, the remedy is totally inadequate, *and the treaty* "*itself may be rendered nugatory*.

"When, as in the present case, the surrender is to "one of the States of the United States, the prisoner "passes beyond the control of the Federal Government, "and into that of the State. Upon complaint made by "the British Government to the Federal Government "of an abuse by the State of Ohio of the process "under the treaty, the Federal Government could only "answer as it has done in many instances heretofore, "that under our system of State and Federal Govern-"ment, *the latter is powerless to control the State au-*"*thorities.*"

State v. *Vanderpool, supra.*

If Peru, from which Mr. Ker was kidnapped, or England, of which he is a subject, should complain to the Federal executive of the abuse of this treaty, in the manner of his delivery up to justice, what would be the outcome? Would the executive refuse to usurp the province of the courts, consistent with the opinions of the courts in the *Hawes, Blandford, Watts* and *Vanderpool* cases *supra*, or would the executive perform the duty enjoined upon the courts, and proceed to enforce the terms of the treaty?

Are the courts in Kentucky, Texas, California and Ohio to be permitted to construe and enforce these extradition treaties without interference from the executive, and the executive to enforce the treaties in Illinois and New York according to his construction and discretion without interference from the courts?

In England a man " gets no rights by his flight," nor does he get any *right* by reason of a treaty, for the provisions of the treaty concerning him may or may not be insisted upon, as the executive may determine; and in the exercise of its prerogative the executive may give one man the benefits of the treaty and deny the same benefits to another. But the whole policy of our constitution, whose framers had spent thousands of lives and millions of treasure in combating the prerogative of the king, is to take from the executive, as far as possibly consistent with the safety of the government, all power over the life, liberty and property of men within the government.

In this country a man " gets no rights by his flight," but as we have seen, he does get *rights* by the terms of a treaty, because that treaty is a *law;* and not only by the policy of our institutions, but by the plain language of the constitution, the executive is *deprived* of all power of interference with those rights, because they are rights recognized and controlled by *the law*, and the courts are commanded to enforce them as such, equally, to the benefit of all men.

"*No one holds his liberty subject to State comity or on* "*any less tenure than constitutional right.*"

In re Cannon, supra.

The doctrine of convenience and necessity, to which Justice SCOTT postponed the language of this treaty, and the reasoning of the courts passing upon similar treaties, always has at least two sides to it. Suppose that upon demand by England or Peru upon the federal executive for the surrender of Mr. Ker, or some other person whom the State had procured by such process as here shown; the governor of the State should refuse to permit the federal executive to have the fugitive to surrender; what would be the position of the federal executive, whom we have seen is powerless to coerce the governor or to comply with the request of the foreign power without coercing the governor? Here, then, is an opportunity in the governor of any State to complicate the foreign affairs of the general government; and the general executive utterly powerless to prevent the complication, according to the courts of last resort in

Kentucky, Texas and Ohio, except by usurping an authority which the constitution never intended he should exercise. Are the foreign affairs of the general government and the consequent safety of all the States to be left to the risk of such complications, because the officials of some State have no regard for the treaties of the government? The answer to all this seems to be one simple maxim—

"*The court will enforce a rule of construction which will avoid all complications.*"

And the only way to do this is to declare "that no word, sentence or clause in this treaty is meaningless, void or insignificant," and that *every part* of it is to be enforced by the courts.

Such was the gate for complications which the respective opinions of Judge BENEDICT and Justices CHURCH and SCOTT left open, and which the opinions of LINDSAY, HOFFMAN and JOHNSON attempted to close, and such was the very gate which the constitution sought to close when it declared in Sec. 10, Art 1: "No State shall enter into any treaty, alliance or confederation."

On this subject Chief Justice TANEY said: "The "framers of the constitution manifestly believed that any "intercourse between a State and a foreign nation was "dangerous to the Union; that it would open a door of "which foreign powers would avail themselves to obtain "influence in the separate States. Provisions were there"fore introduced to cut off all negotiations and inter"course between the State authorities and foreign na"tions."

Holmes v. *Jennison*, *supra*.

Now if it is the intent of the constitution to prevent the State of Illinois from making a treaty with Peru, to obtain the possession of offenders against its criminal code, because such a thing would be dangerous to all other States and to the general government; is it not just as much the intent of the constitution to inhibit the same result, by an indirect proceeding, which is manifestly more dangerous than the proceeding directly inhibited?

OF THE INTER-STATE REQUISITION PROCEEDING.

Considerable stress is laid upon this subject by Justice SCOTT in his opinion in this case, although he finally abandons it with the admission that to hold it to be of consequence would be too technical The circumstances concerning this inter-State requisition are set out in the plea and are as follows: While Mr. Ker was at Honolulu in the Sandwich Islands, held a close prisoner by Julian, the State agent, and the officers of the U. S. ship "Essex," on board of the vessel where the original kidnappers had placed him, to-wit: On June 18th, 1883, Governor Hamilton of Illinois, directed a requisition upon the Governor of California for the arrest and surrender of Mr. Ker, pursuant to the inter-State law as a fugitive from the justice of Illinois, and appointed Frank Warner as State agent. Pursuant to this requisition the Governor of California, on June 25th, 1883, issued his warrant of extradition, although Mr. Ker did not arrive in California until two weeks following, to wit: On July 9th, 1883, when he was brought in by Julian on the ship "City of Sidney" from Honolulu, and Julian and Warner brought Mr. Ker to Chicago and placed him in custody of the sheriff.

No attention was given this proceeding by counsel upon either side in the respective arguments before the

Supreme Court of Illinois, and it is respectfully insisted that the proceeding was and is entitled to no respect or consideration whatever. In the first place the inter-State law provides as follows:

"Whenever the executive authority of any State or "Territory demands any person as a fugitive from justice "of the executive authority of any State or Territory to "which such person has fled, and produces a copy of an "indictment found, or an affidavit made before a magis-"trate of any State or Territory, charging the person "demanded with having committed treason, felony or "other crime, certified as authentic by the governor or "chief magistrate of the State or Territory from which "the person has fled, it shall be the duty of the execu-"tive authority of the State or Territory *to which such* "*person has fled* to cause him to be arrested and "secured, etc."

Sec. 5278, U. S. R. S.

Now, as the papers upon which the Governor of Illinois based his requisition to California, and upon which the Governor of California based his warrant, not only failed to show that Ker had fled to California or that he was to be found there, but alleged that "he was about to arrive in California;" and as the plea alleged, that on June 18th, when our governor issued his requisition, and on June 25th, when the Governor of California issued his warrant, Ker was at Honolulu in the Sandwich Islands. And that the indictments were not certified as authentic by our governor; the court will readily see why that the California requisition and warrant were considered utterly void, as being without any of the jurisdictional requirements of the act of Congress. The party required to be delivered up had never been within the territorial limits of California at the time the application was made, and the governor's warrant issued.

But there are much stronger reasons for ignoring this California requisition. If the treaty is not a law, and the court can not look behind its capias to inquire into its jurisdiction, or whether Mr. Ker has been delivered up to justice in the mode provided by the treaty, then Lord TENTERDEN'S rule applies here, and the California requisition is utterly useless, and can have no possible bearing on the case—the capias is strong enough. But if the treaty is a law to be enforced by the court, a law governing the entire question of the delivery up to justice of a man in Peru; a law providing how that object shall be accomplished, and, in order to maintain itself, necessarily inhibiting every other mode of obtaining jurisdiction, then the California requisition was simply a step in the evasion of the supreme law and consequently a step inhibited.

If this treaty provided in terms "that a fugitive should only be delivered up to justice in the mode provided," it is manifest that this kidnapping and inter-State proceeding would be unavailing to confer jurisdiction. If these precedent conditions are of the essence of the treaty, then the maxim, *expressio unius, est exclusio alterius*, applies to them, and the result is the same as though the prohibition was expressed.

IN CONCLUSION.—Under the rule laid down by Chief Justice TANEY, in *Holmes* v. *Jennison*, *supra*, that where the governor of a State acting under authority of law commits an act in violation of the supreme law, that it is nevertheless, as to the supreme law, the act of the State; it may be entirely consistent to say, "that when the State procures the appointment of an agent under authority of law to obtain foreign extradition, and that agent violates the supreme law and the rights of the accused under it, and the State accepts and enjoys the fruits of such violation, such violation of the supreme law is, as to that law, the act of the State. If this is so this judgment must be reversed.

Or, as declared by Chief Justice JAY, in *Jones* v. *Walker*, *supra*, that to violate the rights of a person accruing under a Federal treaty, is to violate the Federal sovereignty itself; then the jurisdiction based upon a violation of the Federal sovereignty must fail, and this plaintiff in error be released.

But this case is submitted upon a broader and more simple proposition than either of these, namely:

That men can only be brought to trial for crime by "due process of law," and when the Federal law provides what the rights of an accused shall be, and what shall be necessary to oust those rights, that such Federal law must be obeyed, and that a jurisdiction obtained by direct or indirect evasion of the Federal law is *unlawful* jurisdiction and consequently no jurisdiction at all. And, therefore, this judgment of the Supreme Court of Illinois should be reversed, and the release of plaintiff in error directed.

It is hoped that no apology will be considered necessary for the length of this brief or the time taken upon the subject. The importance of the question cannot be overestimated, as was said by Chief Justice TANEY in *Holmes* v. *Jennison*, *supra:*

"This involves an inquiry into the relative powers of "the Federal and State Governments, upon a subject "which is sometimes one of great delicacy In the case "before us the party concerned is an obscure individual, "not a citizen of the United States; and who is not "likely to attract any great share of public attention. "But in times of war and of high excitement, the principle now to be decided may reach cases where great "public interests are concerned, and where the surrender "may materially affect the peace of the Union. We "are fully sensible of the importance of the inquiry, "and of the necessity of approaching it with the utmost "deliberation and caution."

And the opinion of this court in the case at bar, it is confidently expected, will place these extradition treaties, in the jurisprudence of the country, upon that plane of dignity which the constitution so evidently intended they should occupy, and will forever destroy the numerous opportunities for inter-national and national complications, and violation of personal right, which their evasion leaves open.

Respectfully submitted,

ROBERT HERVEY and
C. STUART BEATTIE,
For Plaintiff in Error.

that plea a general demurrer was sustained and defendant was by the court required to plead over. Against the protest of defendant that he was entitled to immunity from prosecution for the offenses alleged against him on the indictment, on account of the matters set forth in his plea and because he refused to plead over, the court entered a plea of not guilty for him. On the trial the jury found defendant guilty of embezzlement as charged in the indictment and fixed the term of punishment at ten years in the penetentiary. A motion for a new trial entered by defendant was overruled and the court pronounced judgment on the verdict and defendant brings the case to this court on error. One ground of error relied on with much confidence is the decision of the court sustaining the demurrer to defendant's plea, calling in question the right of jurisdiction of the court to proceed with the first trial against him, or what is the same thing, it is insisted it was error in the court not to grant him immunity from prosecution.

Of course the demurrer admits the facts alleged in the plea, and there can be no controversy as to what they are; shortly stated the principal facts are, that upon the written request of the Governor of Illinois the President of the United States issued an extradition warrant directed to the Government of the Republic of Peru for the surrender of defendant under the treaty of our Government with that Government, and named therein Henry Julian as messenger to receive from the authorities of Peru. The crime of larceny with which defendant stood charged is one of the offenses specified in the treaty for which a party should be surrendered, and it was specified in the President's warrant as the crime for which his surrender was demanded. In the same day the execution warrant was issued, the Secretary of State at Washington made a written request upon the United States Consul acting at Lima to procure the execution of Peru to surrender defendant to Julian, under the treaty between the United States and Peru of September 12, 1880, which it is averred was and is the only treaty in force between the two Governments. It is then averred no request was ever made by the U. S. Consul at Lima or by Julian or any other person before any of the authorities or diplomatic agents of the Government of Peru, for the surrender of defendant in compliance with the President's warrant, nor was any consent or authority given by the authorities or diplomatic agents of Peru to Julian or to any other person to arrest and remove defendant from Peru for any cause, and on the 3rd day of April, 1883, while defendant was domiciled at Lima in Peru, Julian with the aid of persons whose names are unknown, without any authority or warrant from the authorities or diplomatic agents of Peru, arrested defendant and forced him to go to Callas and then placed him on board the Steamship "Essex," and kept him a close prisoner on such vessel. Afterwards the "Essex" sailed to the port of Honolulu with defendant on board, and there at that port, but perhaps outside the harbor, defendant was transferred to the "City of Sidney," an American ship about to sail for San Francisco in California. The steamship "Essex" was a vessel belonging to the navy of the United States, and was at the time commanded by officers of the Navy. The "City of Sidney" was, perhaps, an American vessel, but how that is matters little. While these events were transpiring the parties prosecuting procured from the Governor of the State of

Illinois a requisition upon the Governor of California for the arrest of defendant in which Frank Warner was named a suitable person to receive defendant for the authorities of California and bring him to this State for trial. Afterwards the Governor of California issued his warrant in pursuance with the, requisition of the Governor of the State of Illinois for the arrest of defendant. On his arrival at San Francisco in the "City of Sidney" defendant was arrested on the warrant of the Governor of California and delivered to Frank Warner—the messenger named to receive him, and was by him brought into this State and delivered into the custody of the Sheriff of Cook County, where the indictment on which he was afterwards tried was found and was then pending in the Criminal Court against him; other matters are contained in the plea but as they are not necessary to an understanding of the discussion that is to follow they need not be stated.

One proposition asserted by counsel for the defense is the Criminal Court of Cook County never obtained jurisdiction of defendant by "due process of law" for the purpose of trying him for larceny or any other crime.

The position taken on this branch of the case is much weakened by the consideration it appears from the averments of the plea itself, the bringing of defendant into the State, trying him for an offense committed within its limits was by "due process of law" whatever wrong may have been done him elsewhere. The Governor of the State of Illinois made a requisition upon the Governor of the State of California for the surrender of the defendant as a fugitive from the justice of the State and designated Frank Warner to receive defendant and bring him back to this State. In compliance with that requisition the Governor of California did issue his warrant upon which defendant was arrested within the jurisdiction of that State and delivered into the custody of Frank Warner who brought defendant into this State and delivered him to the Sheriff of Cook County That was in accordance with usage and law. It is not allowable on the trial of one who has been surrendered by a sister State under the laws of Congress as a fugitive from justice to enquire as to the regularity or irregularity of such surrender. It effects neither the guilt or the innocence of the accused nor the jurisdiction of the court to try him.

Conceding as may be done, defendant was arrested in Peru and brought into the State of California without warrant of law, the State now prosecuting defendant was not a party to any violation of any treaty or other public law. The application the State made to the Executive department of the general Government was for the legal arrest of the defendant, and if there was any abuse of the warrant of the Federal Government or any treaty obligations with a friendly power violated, it was done by the State now conducting the prosecution against defendant. Julian whom it is alleged made the illegal arrest of the defendant and brought him within the jurisdiction of the State of California, was acting either under the warrant of the President or on his own responsibility He did not bring defendant into this State at all. It was done by another person on a requisition from the Governor of Illinois and on a warrant issued by the Governor of California for his arrest in that State.

Of the action of the State prosecuting him, defendant can have no just ground of complaint that he was brought within its jurisdiction without "due process of law."

The People v. *Rowe*, Cr. Rep. 253.
Adriance v. *Lagrave*, 59 N. Y. 110.
The State v. *Ross*, 21 Iowa, 467.

But waiving every objection to the plea that may seem too technical and considering it on the broadest grounds taken in its support it is thought the demurrer was properly sustained. Three propositions are stated which if they can be maintained it is insisted lead to the conclusion the Criminal Court of Cook County never obtained jurisdiction of defendant to try him for larceny or any other crime.

1st. That the United States by its treaty with the Republic of Peru provided "due process of law" for getting jurisdiction of persons domiciled in that country charged with having committed certain crimes, among which is larceny, of which defendant was charged in one count of the indictment against him.

2nd. That such "due process of law" must be obeyed in all its terms, expressed or implied, and,

3rd. That such "due process of law" for the purpose of getting jurisdiction in such cases by necessary implication excludes any other mode of getting jurisdiction.

The defendant was not in fact brought within the jurisdiction of the United States under its treaty with Peru, but the argument assumes that if defendant was brought back to the United States otherwise than under the treaty between the United States and Peru, his capture and detention would be unlawful as being in violation of a right of asylum he is supposed to have had under the treaty at the place he was domiciled when captured. No principle is suggested on which this proposition can be maintained as broadly as stated, nor is any case English or American cited where the decision was rendered on analogous facts with the case being considered that holds the doctrine contended for. Undoubtedly at common law, the rule is, the court trying a party for a crime committed within its jurisdiction, will not investigate the manner of his capture in case he had fled to a foreign country and had been brought back to its jurisdiction, although his capture had been plainly without authority of law. It is sufficient the accused is in court to require him to answer the indictment against him. It is thought and with good reason any other rule would work great embarrassment in the administration of the criminal law.

In *ex parte* Scott, 9 Barn. and Cress. 446, the accused was arrested at Brussels by a police officer without any warrant of law and brought back to England. The prisoner was brought upon *habeas corpus* that she might be discharged. It appeared a true bill had been found against her for a misdemeanor, and Lord Tenterden, before whom the writ was heard, refused to enquire into the circumstances of her arrest, whether it was legal or illegal and held the accused amenable to justice. It was said in that case if the act complained of were done against the law of a foreign country, that country might have vindicated its own law. It does not seem to be doubted that this case accurately states the common law on this subject. Nor is it doubted that many well considered American cases declare the same doctrine.

The State v. *Smith Bailey*, (South Car.) Law Rep. 281, and note.

The State v. *Brewster*, 7 Ver. 118.
Adriance v. *Lagrave*, 59 N. Y. 110.
The State v. *Ross*, 21 Iowa, 467.
U. S v. *Caldwell*, 8 Blatch. 131.
U. S. v. *Lawrence*, 13 Blatch. 295.

The rule is different in civil cases for the reason a party guilty of a fraud in being a party within the jurisdiction of the court will not be permitted to have a personal advantage from his own wrongful conduct.

It may be well to recur again to the distinction taken by counsel which it is insisted takes the case being considered out of the rule established by the English and American cases cited, that some further discussion may be had upon it. The position taken is that where a treaty exists between two governments no capture can lawfully be had of a party accused of crime in the country to which he has fled for asylum, except under the terms of such treaty, and if a capture and removal of a party is made in violation of the treaty it is without "due process of law" and the court within whose jurisdiction the accused is wrongfully brought obtains no rightful jurisdiction to try him for any crime, either for the crime for which it was attempted to extradite him or for any other crime. This exact question arising in this case was not involved in either of the cases *ut supra*, nor indeed has the attention of the court been called to any case where the facts were precisely analogous. Of course no one would contend the manner of the capture of one accused of crime who has fled from the justice of the State could effect in any manner the question of his guilt or innocence of the crime charged in the indictment, and how can it effect the jurisdiction of the court before whom he stands, to try him for crime is a proposition not supported by any satisfactory reasoning nor by any analogies of the law. But place it on the yet broader and perhaps more reasonable ground it is not perceived how any irregularity in the capture and return of a fugitive from the justice of the State can secure him immunity from prosecution for crime, whether it is one for which he might be lawfully extradited under any public law or not. No reason arising out of any public exigency or any consideration as to the liberty of the citizen requires the adoption of any such doctrine in to the jurisprudence of the State. Should the laws of a foreign nation be outraged by the wrongful capture and transportation of a party accused of crime and who at the time was domiciled within its jurisdiction, in case a controversy arose it would seem it would be between the two general governments and as to which the State courts could determine nothing. It is confidently insisted all through the argument for the defense that defendant's right of asylum under the treaty between the two governments was complete when he was domiciled in Peru—and that he has been deprived of that right by sheer force without "due process of law " But is that position tenable? Upon what principle can it be maintained? As a question of law on the facts as stated in the plea, defendant never had any right of asylum in Peru that would secure his immunity from arrest on account of offenses mentioned in the treaty and for which a party was subject to extradition. Conceding as may be done for the purposes of this decision the proposition insisted upon the enumeration of certain crimes in the treaty for which a party may be extradited, implies that as to all other offenses he is guaranteed asylum in the country where he is domiciled, how does that, if true, affect the question being considered? As to the crime of larceny with which the defendant was charged he could have no right of asylum in Peru, as that is one of the crimes enumerated in the treaty and what right secured by treaty was violated when he was arrested either with or without due process of law. The accused was subject to extradition at any time under the treaty and what difference can it make in law as to the right of a State court to try defendant for an extraditable crime whether the existing treaty was in fact observed in all its forms. That which was done, if wrong, was in violation of international law, and if the Government of Peru does not complain of the arrest of defendant within its jurisdiction as an infraction of international law, it does not lie in the mouth of the defendant to make complaint on its behalf. Questions arising under international law concern principally the nations involved and their settlement is a national affair.

Rejecting, as must be done, the erroneous assumption, defendant had the right of asylum in Peru under the treaty between the two governments and the argument for the defense is wholly without force. It is plain he had no right of asylum the law of either government would protect. The treaty as to the crime of larceny with which defendant stood indicted had provided no asylum that would secure him immunity from arrest for that crime in the country where he was domiciled The utmost that can be claimed is that the person having the President's warrant for extradition of defendant proceeded irregularly and may have rendered himself liable as for a personal trespass, but he deprived defendant of no right of asylum in the country of his temporary domicile for the simple reason he had none secured by any public law of which he could be dispossessed.

The attention of the court has been called to *Com.* v. *Hawes*, 13 Bush. 700; *The State* v. *Vanderpool*, 16 Vol. C. LCN. p, 34, and other analogous cases upon which great stress is laid as holding principles it is insisted ought to control the present decision. These cases have been examined and it is found they hold the doctrine, a fugitive from the justice of the State who has been brought back from the country to which he has fled, on a warrant of extradition in conformity with the terms of a treaty existing between the two governments, cannot be proceeded against or tried by the State for any other offenses than those mentioned in the treaty and for which he was extradited without first being afforded an opportunity to return to the country whence he had been brought. Some of these cases also declare the familiar principle of international law that the right to demand and receive from another the custody of an offender against its laws and who has sought an asylum in such foreign country, depends upon treaty stipulations between such governments. Where no treaty exists no obligation that can be insisted upon exists to surrender criminals for trial to the government from which they have fled, but as a matter of country between friendly nations great offenders are usually surrendered on request from the government claiming the right to try them. A principle running through this latter class of cases has much that commends itself to a sense of justice. It is that where a person whose extradition has been granted for trial for a particular crime named in the extraordinary warrant, the demanding government obtains no lawful right to try him for any other offenses without bad faith to the government that consented to his extradition and for which it would have just grounds to demand reparation. Such an act would be in violation of both the letter and spirit of the treaty. But this doctrine, if it shall be conceded it has for its support natural justice and even the weight of authority, can have no application to the case being considered. Here the complaint is, the treaty was not observed in the capture and detention of the defendant. It was done by force outside of its provision. The extradition warrant issued by the executive of the United States demanded defendant should be surrendered on a charge of larceny that he might be tried for that offense. That is an extradition crime under the treaty with the Government of Peru. It was on that charge he was put on trial. It is true he was not convicted of larceny as at common law, but the same indictment contained counts for embezzlement, an offense of which, if convicted, the statute declares "he shall be deemed guilty of larceny." Upon which he was tried at the same time of the trial of the charge of larceny and was convicted. Embezzlement as defined in sections seventy-four and seventy-five of the criminal code of this State is not larceny at common law, and is perhaps not larceny in the sense that term is used in the treaty with Peru aud for which a party may be extradited.

Had defendant pleaded immunity from prosecution on the counts which charge him with embezzlement and not as to the count that charge him with larceny as at common law which is, as has been seen, an extraditable crime under the treaty with Peru, then a closer analogy would have existed between his case and the cases last cited and the question might have been presented whether this court would adopt the doctrine of those cases as sound law. That he did not do. By his plea he sought immunity from prosecution on the whole indictment. The plea might have been good as to the counts that charged embezzlement, being a non-extraditable offense, and not good as to the count that charges larceny as at common law, which it is conceded was an extraditable offense and was embraced in the extradition warrant. Being bad as to one count the plea would be bad as to the whole indictment which it professed to answer. There is another reason that leads to the same conclusion the case in hand is now within the rules declared in the latter line of decisions. It is that defendant, as has been seen, was not surrendered by the Government of Peru under its treaty with the United States.

According to the averments in the plea no effort was made to obtain defendant on the extradition warrant, and the official authorities of Peru were not asked to and never did consent to his capture within the jurisdiction of that government. It was done by sheer force and not under the treaty at all. That brings the case more nearly under the decisions first cited and they must be regarded as of controlling authority. But aside from all authority on principle defendant has shown no right to immunity from prosecution for the offenses for which he was indicted. The Federal Government has itself violated no treaty with the Republic of Peru.

The arrest and detention of defendant was not by any authority of the general Government and no obligation is implied on the part of the Federal or any State government to the Republic of Peru to secure defendant immunity from prosecution for any offense. What was done was done by individual wrong, precisely as was done in *ex parte* Scott, *supra*, and *The State* v. *Brewster*, *supra*. The invasion of the sovereignty of Peru if any wrong was done, was by individuals, perhaps some of them owing no allegiance to the United States and not by the Federal Government. Should the Government of Peru complain its sovereignty had been invaded by citizens of the United States that would be a question arising under international law and not under any act of Congress or treaty of the United States. Nor will defendant be permitted to complain that his right of asylum in Peru has been violated, for, as before stated, he had no right of asylum as against the crime of larceny under the treaty with Peru, nor any absolute right to asylum under comity existing between nations. Whether a nation will surrender a fugitive from justice that seeks with it an asylum is a question of national comity resting in discretion. In no view that can be taken is defendant entitled to immunity from prosecution on the indictment under which he was convicted.

"Errors are assigned affecting the merits of the case," and thereupon the court proceeds to pass upon the other errors assigned and affirms the judgment.

Ker v. *People*, 110 Ill. 627.

119/436

Office Supreme Court U. S.
FILED.
APR 24 1886
JAMES H. McKENNEY.
CLERK.

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1885.

FREDERICK M. KER,
Plaintiff in Error,
vs.
PEOPLE OF THE STATE OF ILLINOIS,
Defendant in Error.

Error to
Supreme Court
of Illinois.

BRIEF FOR DEFENDANT IN ERROR.

GEO. HUNT, Esq.,
ATTORNEY GENERAL OF STATE OF ILLINOIS.

LEONARD SWETT, Esq.,
P. S. GROSSCUP, Esq.,
OF COUNSEL.

BARNARD & GUNTHORP, LAW PRINTERS, 44 & 46 LASALLE ST., CHICAGO.

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1885.

FREDERICK M. KER,
Plaintiff in Error,
vs.
PEOPLE OF THE STATE OF ILLINOIS,
Defendant in Error.

Error to Supreme Court of Illinois.

BRIEF FOR DEFENDANT IN ERROR.

The general doctrine is well settled, both in England and this country, that the jurisdiction of the trial court cannot be affected by the circumstances of the capture.

In *ex parte Susanna Scott*, Court of King's Bench, 9th Barn. & Cress., 446, decided in 1829, it appeared by the affidavits that an indictment for perjury had been found against Scott, and a warrant had been granted by Lord Tenterden for her arrest. The police officer to whom the warrant was directed, arrested her at Brussels, upon which she applied to the English ambassador for assistance, but on his refusal to interfere, was conveyed to

England and brought before Lord Tenterden upon *habeas corpus*. In deciding against her discharge Lord Tenterden said:

" The question therefore is this, whether if a person " charged with a crime is found in this country, it is the " duty of the court to take care that such party shall be " amenable to justice, or whether we are to consider the " circumstances under which she was brought here. I " thought and still continue to think that we cannot inquire " into them. If the act complained of were done against " the law of the foreign country, that country might have " vindicated its own law. If it gave her a right of action " she may sue upon it."

In *State* v. *Smith*, 12 South Carolina Law Reports, 283, decided in 1829, it appeared that Smith had been arrested in North Carolina by citizens of South Carolina without resort to extradition proceedings, and having been brought to South Carolina, was put upon his trial and convicted of a crime committed within that state. The court say:

" The only remaining question is whether the prisoner " is entitled to discharge in consequence of being illegally " arrested in North Carolina and brought into this state. " The pursuit of the prisoner in North Carolina and his " arrest there was certainly a violation of the sovereignty " of that state." But conclude that whatever may have been the circumstances of the arrest, " It does not come " within the control of the court, but belongs to the executive department of the government. The prisoner is an " offender against our laws, and for that he owes atonement."

In *State* v. *Brewster*, 7 Vermont, 118, decided in 1835, it appeared that Brewster interposed to an indictment for burglary and theft, a motion for dismissal on the ground that he was forcibly, and against his will, brought from Canada by citizens of Vermont for the purpose of being prosecuted for the said offenses. This motion was overruled, with leave to Brewster to file a plea alleging these facts in the Supreme court, if, in the opinion of that court, such facts would affect the jurisdiction. That court overruled his motion for leave to so plead, saying:

> "His escape into Canada did not purge the offense nor "oust our jurisdiction. Being retaken and brought, in fact, "within our jurisdiction, it is not for us to inquire by what "means, or in what precise manner he may have been "brought within the reach of justice. It becomes, then, "immaterial whether the prisoner was brought out of "Canada with the assent of that country or not."

In *Dow's case*, 18 Pennsylvania State, 37, decided in 1851, the facts were that Dows being indicted for forgery in Pennsylvania, fled to Michigan. A requisition was made upon the governor of Michigan, and a warrant issued for his arrest. While this warrant was out, Dows was apprehended on board a steam boat at Detroit by private parties without a warrant, and carried on board the boat to Pennsylvania. These facts were set up by him as a reason why he should be discharged from pleading to the indictment; the Supreme court overruled his application.

In *State* v. *Ross and Mann*, 21 Iowa, 467, decided in 1866, it appeared that the prisoners, having been indicted in Iowa for stealing, were apprehended in Missouri, and brought by force and against their will into Iowa, by parties acting without any authority either from the authorities of Iowa or Missouri. These facts were pleaded in abatement to the jurisdiction of the court. The court overruled the plea, saying:

"It may be conceded that the prisioners were arrested in "the State of Missouri and brought to this state by force "and against their will, by parties acting without authority "either under requisition of the governor, or otherwise. "After thus being brought to the state, however, they "were rearrested, turned over to the authorities, and "proper steps taken for their detention and trial. The "claim is, that this arrest was in violation of the law; "that the prisoners were brought within the jurisdiction "of the state by fraud, violence, and without any semblance of authority or right; and that comity to the "rights of a sister state, a just appreciation of the rights of "a citizen, and a due regard for the integrity of the law, "and its administration, demand that courts should, under "such circumstances, refuse their aid, and indeed, that "there can be no rightful exercise of jurisdiction over "those thus arrested. * * * That our own laws have "been violated is sufficiently shown by the indictment. "For this, the state had a right to detain the persons and "it is of no importance how, or where, their capture was "effected."

In *United States* v. *Caldwell*, 8 Blatch., 131, decided in 1871, it appeared that the defendant was indicted for bribing an officer of the United States. He pleaded against the jurisdiction, on the ground that he was brought therein from Canada under an extradition treaty on the charge of forgery, and that the offense of bribery was not within the treaty. **Benedict**, J., sustained a demurrer to the plea, saying:

"Whether extradited in good faith or not, the prisoner "in point of fact is within the jurisdiction of the court, "charged with a crime therein committed; and I am at a "loss for even a plausible reason for holding such a plea "as the present, that the court is without jurisdiction to "try him. The question appears to me to be not one of "the jurisdiction of the court, but rather of privilege "from arrest; and I cannot say that the fact that the de- "fendant was brought within the jurisdiction by virtue of "a warrant of extradition for the crime of forgery, affords "him a legal exemption from prosecution for other crimes "by him committed."

In the matter of Noyes, United States Circuit court for New Jersey, reported in Vol. 17, Albany Law Journal, 407, it appeared that Noyes was a citizen of Connecticut, and being in the city of Washington in relation to legislation pending before Congress, was captured in his room about midnight, by three men who took him to the State of New Jersey, his captors having no authority under extradition proceedings to arrest him. Being detained by the State authorities, he set up these facts in an application for a writ of *habeas corpus*. Justice NIXON refused the writ, and in disposing of the question says:

"If the state court, without regard to the lawfulness or "unlawfulness of the methods adopted to obtain the custody "of the body of the prisoner, may detain him for trial upon "the same or other indictments charging him with offenses "against the criminal laws of the state, he has no claim "upon this court for a discharge on the ground that his "rights as a citizen were violated by the parties who "secured his person in a foreign jurisdiction, other than "by due process of law."

To the same effect are the adjudications in *People* v. *Rowe*, 4 Parker, N. Y. Cr. C., 253; *ex parte Coupland*, 26 Texas, 388; *Adriance* v. *LaGrave*, 59 N. Y., 110; *The United States* v. *Lawrence*, 13 Blatch., 295.

The doctrine of the foregoing cases is admitted by the learned counsel for the plaintiff in error to be settled law in both England and America. But it is contended that the treaty between the United States and Peru of Sept. 20th, A. D. 1870, for the extradition of fugitives, introduces into this case an element not found in the previously adjudicated cases. The learned counsel insist, if we understand their argument, that the treaty constitutes the sole authority for extradition between the two countries; that a capture made outside of the authority and forms of the treaty would be in contravention thereof, and that therefore the courts could not put to trial a fugitive so captured without doing violence to the terms of the treaty. This doctrine is stated to be upon the authority of *Commonwealth* v. *Hawes*, 13 Bush (Ky.), 700; *Blandford* v. *The State*, 10 Texas, 635; *The State* v. *Vanderpool*, 39 Ohio State, 273; *United States* v. *Watts*, 14 Federal Reporter, 130.

The reasoning of learned counsel is not supported either by logic or the authorities cited. The cases cited were those of fugitives who had been brought from countries having treaties for extradition with the United States, containing stipulations that fugitives charged with certain offenses should be delivered up for trial for the offenses named in the demand; the question decided was, if the courts to which they were returned had jurisdiction to try them for offenses *other* than those named in the demand. The reasoning upon which the conclusions were arrived at is, that the respective treaties under which the fugitives were extradited, having stipulated that they should be tried for the offense named in the demand, *by implication* provided that the fugitives thus extradited should be tried for no offense other than the one so named; connecting that implied stipulation with the constitutional provision that a treaty is a part of the supreme law of the land, the courts concluded that they were *prohibited by the supreme law of the land* from trying fugitives for any offense other than the one named, and that to that extent the several treaties curtailed their jurisdiction. The elements of these decisions are, *first*, that the respective treaties of extradition in question *prohibited* the trial of the prisoners for any offense other than that named in the demand; and *second*, that such prohibition was a part of the supreme law, and therefore limited the jurisdiction of the state courts. Without stopping to discuss now the correctness of the premises or reasoning upon which these adjudications rest, we deny that they afford any ground for the position taken by our opponents.

First. The treaty for extradition of September, 1870, between the United States and Peru, contains no implied stipulation that a fugitive found within the territory of either country, shall not be put to trial for any offense in the courts of the other, unless his capture has been effected under the authority and forms of the treaty.

Such interpretation would violate both the letter and purpose of the treaty. Treaties for reciprocal extradition were not intended as additional guarantees of the national right to extend asylum. The purpose for which they were entered into was to create an *obligation* upon the several parties to surrender fugitives found upon their soil. A single historical glance at the state of international law upon the subject of extradition, at the time treaties for extradition came to be made, will clearly show the purpose of their introduction. One school of international law writers held that nations, even in the absence of special agreement, were under international obligation to surrender fugitives from the justice of other civilized nations. Another school contended that nations were under no *obligation* to withdraw asylum from fugitives, but that their surrender were acts of *comity*, which ought to be exercised upon proper occasions. The whole contention was whether the withdrawal of asylum from, and the surrender of a fugitive, by the nation to whose territory he had fled was a matter of *obligation*, founded upon general international duty, or a matter of *comity*, to be exercised upon individual judgment of the circumstances of each case. In practice, the latter view was followed, and thus the whole matter of extradition was subject to the good will or caprice of the government of the territory in which the offender had taken refuge. To secure, therefore, something like *uniform reciprocity* in the surrender of fleeing criminals, special contracts or treaties for extradition were resorted to. The special *object* of these treaties was to designate certain offenders to whom asylum would be no longer extended, and whom the government would be under obligations to surrender for punishment. The treaty in question between the United States and Peru recites its object in the preamble, as follows:

"The United States of America and the Republic of

"Peru, having adjudged it expedient, with a view to the "better administration of justice and the prevention of "crime within their respective territories and jurisdictions, "that persons charged with crimes hereinafter enumerated, should, under certain circumstances, be reciprocally delivered up, have resolved to conclude a treaty "for this purpose, etc., etc."

The purpose of the treaty having been thus attained by fixing the mutual duties of the contracting nations with respect to the designated offenders, the treaty proceeds to construct the *legal machinery* or *procedure* through which those duties may be performed. These two purposes being accomplished, the contract ends. It seems plain that this new graft upon previous international law was intended to *facilitate* the pursuit and punishment of criminals, and not to extend to them further immunity. The treaty does not confer upon the parties thereto *additional right* of giving asylum, but modifies and limits such right as previously existed. If the United States, without the consent of Peru, should go upon her soil to capture a criminal to whom Peru was extending refuge, would such capture be a violation of this special treaty between the two countries, or of the *general sovereignty* of Peru over her own soil? Does the treaty extend any additional security to the right of sovereignty? We submit that its sole purpose is to designate certain cases in which the sovereign right of extending asylum shall *not* be exercised.

Second. The treaty of extradition in question is a contract solely between nations, and does not confer upon the fugitive any right of immunity which is enforceable by the judiciary.

A treaty to which the government of the United States is a party presents two aspects. In one aspect it relates to the government as an *international compact*, and the observance and enforcement of its stipulations rest solely with the political branch of the government; in another aspect, it relates to the nation as *municipal law*, to the extent that it affects private rights of person and property. The treaty-making power having been conferred upon the political branch of the government, upon that branch alone is charged the duty of interpreting and enforcing it, so far as it is a compact between independent nations. If, in the questions growing out of purely international compacts, the judiciary could interpose the enforcement of its interpretations, what could prevent its absorbing the largest and most responsible share in the management of our foreign affairs? In the division of power among the different departments, the jurisdiction of the judiciary with reference to international contracts was limited to their effect upon the *private rights* of individuals. The test of jurisdiction is, does the treaty, as it affects the question, operate upon any *private right* of the citizen, as distinguished from its operation upon the duty or right of the nation, as an independent party?

In the Head Money cases, 112 United States, 598, Mr. Justice MILLER very clearly enforces this distinction:

" A treaty is primarily a compact between independent " nations. It depends for the enforcement of its provisions " on the interest and the honor of the governments which " are parties to it. If these fail, its infraction becomes the " subject of international negotiations and reclamations, so " far as the injured party chooses to seek redress, which " may in the end be enforced by actual war. It is obvious "that with all this the judicial courts have nothing to do, "and can give no redress. But a treaty may also contain "provisions which confer certain rights upon the citizens "or subjects of one of the nations residing in the territorial limits of the other, which partake of the nature of "municipal law, and which are capable of enforcement as "between private parties in the courts of the country. "An illustration of this character is found in treaties, "which regulate the mutual rights of citizens and subjects "of the contracting nations in regard to rights of property by descent or inheritance, when the individuals "concerned are aliens. The constitution of the United "States places such provisions as these in the same category as other laws of Congress, by its declaration that "'this constitution and the laws made in pursuance "thereof, and all treaties made or which shall be made "under authority of the United States, shall be the supreme law of the land.' A treaty, then, is a law of the "land as an act of Congress is, whenever its provisions "prescribe a rule by which the rights of a private citizen "or subject may be determined. And when such rights "are of a nature to be enforced in a court of justice, that "court resorts to the treaty for a rule of decision for the "case before it as it would to a statute."

State of Georgia v. *Stanton, &c.*, 6 Wall., 50.
Martin v. *Borden*, 7 How., 1.
Kennett et al. v. *Chambers*, 14 How., 38.
Cherokee Nation v. *Georgia*, 5 Pet., 1.

Assuming then that the treaty in question implies a promise upon the part of the United States, that extradition will not be effected, except as therein provided for;

and that the United States government in causing or permitting Ker to be brought back to our courts in a manner outside of the authority and forms of the treaty, stood guilty of a violation of these implied terms; the question still remains, who is competent to complain, and to what branch of our government ought the complaint to be made? If the treaty is a purely international compact, conferring no *private right* upon Ker, the only party competent to complain would be the government of Peru. Before Ker can be heard, it must appear that some private right of his has been affected by the acts violative of the treaty. What private right did Ker acquire under the treaty, that has been violated in his capture? He was a flagrant offender against our laws—does a wrong done to Peru give Ker a right against our laws? Is a trespass upon the sovereignty of Peru, a counterclaim, properly pleadable by Ker, to our claim of punishment for his offenses? If so, his case furnishes a new instance of vicarious atonement. Suppose his capture was an unlawful invasion of the soil of Peru, what authority has he shown that Peru is not thankful for the invasion, or desires him to be returned? It is not to be lightly presumed that the sister republic cares to people her soil with our escaped thieves and embezzlers.

There is a hint in the brief of learned counsel that the treaty confers upon the fugitive *a right of asylum.* We beg to suggest that our government was not wholly free from trouble in maintaining the *right of voluntary immigration* upon good motives and for justifiable ends. It would be a considerable advance, either in the right or wrong direction, were we to adopt the doctrine that a malefactor, whose offense the laws of all civilized peoples denounce, after running the gauntlet of flight, is *entitled* to an asylum on the first foreign soil his guilty feet have touched. The term "right of asylum" is not applicable to the fugitive, but means the right of the nation to extend asylum. A fugitive from justice acquires no right of asylum against the hand of the law he has violated. Under the *municipal law of the country to which he has fled* he may have the right of personal liberty until due process of law has been complied with; but, as against the nation from whose justice he has fled, he has such asylum only as the government, in whose territory he is, extends. While in the territory of Peru, Kerr was affected by two relations. His relation to the municipal law of Peru, and his relation to the laws of the United States, from which he had fled. What rights he had under the municipal law of Peru it is not competent in this case to investigate. This is not the court to enforce either the privileges or punishments of foreign law. It would be difficult to point out what *private right* he has against the laws of the United States, under either legislative enactment or treaty. The conception of a *right* upon the part of one person involves necessarily an *obligation* upon the part of others. A right of liberty involves the obligation to allow liberty; a right of possession involves the obligation to refrain from interfering with that possession; a right of property involves the obligation not to trespass upon that property. Under what obligation is the government of the United States to Ker, created by his successful flight? If Peru had surrendered him to the United States independently of the treaty for extradition, what right of asylum could Ker set up against our law? If successful flight beyond the borders of a foreign power confer a *right* of refuge, the maxim of the Spartans, that crime successfully concealed is not reprehensible, ought to be quoted as an authority *very nearly* in point.

In *State* v. *Brewster*, *supra*, the court say:

" This universal practice sufficiently shows that immu-
" nity from punishment is not a legal consequence of hav-
" ing taken refuge in a foreign jurisdiction, to be claimed
" as a matter of right by the offender. If it were so, the
" act of such foreign government in surrendering the
" offender would be in itself improper, and could have no
" legal tendency to deprive him of this right. It is im-
" possible to conceive any sound principle upon which
" such immunity can be conceded to the offender. *
" * * If that nation complain, it is a matter which
" concerns the political relation of the two countries, and
" in that aspect is a subject not within the constitutional
" powers of this court."

In *Dow's case*, *supra*, Mr. Chief Justice GIBSON says:

" The sovereignty of the state, therefore, was not out-
" raged unless it resided in the prisoner's person. A sov-
" ereign state is doubtless bound to fight the battle of its
" citizen when his quarrel is just, but it is not bound to
" maintain him against demands of foreign justice from
" which he has fled. It may or may not interpose its
" shield at discretion, but the exercise of this discretion
" will be directed, not upon any claim he is supposed to
" have upon it, but by a consideration of the consequences
" to the general weal."

In *People* v. *Rowe*, *supra*, the court say:

" As to the arrest, it was undoubtedly the fruit of an
" agreement for the violation of the prisoner's right of
" personal liberty on Canadian soil; for that he has, we

"presume, a remedy in the Canadian courts, and perhaps "in our own. Whether the dignity of Great Britain has "been insulted by the act of its subject, in hurrying the "prisoner across Suspension Bridge from a part of Her "Majesty's dominions, we are not called upon to inquire. "The question is an international one, and cannot arise "unless Her Majesty's government shall see fit to lay the "matter before our government."

In *United States* v. *Caldwell, supra*, Mr. Justice BENEDICT says:

"While abuse of extradition proceedings, and want "of good faith in resorting to them, doubtless constitute a good cause of complaint between the two governments, such complaints do not form a proper subject of investigation in the courts, however much those "tribunals might regret that they should have been permitted to arise. To hold otherwise would, in a case "like the present, permit a person accused of crime to "put the government on trial for its dealings with a foreign power."

In *The United States* v. *Lawrence*, 13 Blatch., 295, the court says:

"An offender against the justice of his country "can acquire no rights by defrauding that justice. "Between him and the justice he has offended, no "rights accrue to the offender by flight. He remains at "all times and everywhere liable to be called to answer "to the law for his violations thereof, provided he comes "within the reach of its arm."

In the matter of Noyes, supra, Mr. Justice NIXON says:

"Questions were discussed in the argument which may "properly arise between governments as to the construc-

"tion of extradition treaties * * * but which, in my "judgment are not involved in the present inquiry. * * "* It is a claim on the part of the accused that his "criminal violations of the law are to be condoned by his "personal injuries. It is asking a court to suspend its "most responsible duties, to wit: the trial of alleged offenders against the penal code of the state, while the "persons charged with the crime are instituting preliminary investigations into the methods adopted to bring "them within its jurisdiction."

In re Angelo DeGiacomo, 12 Blatch., 391, DeGiacomo was demanded for the crime of murder committed in Italy *prior* to the conclusion of the treaty for extradition between the United States and Italy. On an application for *habeas corpus*, his counsel insisted that the prisoner had acquired a right of asylum in the United States, which was a substantial personal right, and that a treaty could not act *ex post facto* to deprive him of that right. Mr. Justice BLATCHFORD overruled the application, saying, (page 400):

"The principle on which treaties for extradition are "made is, that no nation ought to permit its territory to "be made a place of refuge for criminals. This principle is violated by the mere fact of finding the fugitive "in such territory, as a place of refuge, without reference "to the particular time when the crime was committed. "Therefore if there be no affirmative restriction existing "which limits the power of the government to make a "treaty, which covers the surrender of fugitives for "crimes committed before the making of the treaty, and "if the treaty, in the present case, covers the case of the "prisoner, no ground exists for his discharge. I am not "prepared to admit that a person who has committed a "crime abroad, and fled to this country, has acquired a "right of asylum here as a personal right, so that under a "subsequent law, whether treaty or statute, he cannot be "delivered up as a fugitive from justice."

Third. The crimes with which Ker was charged being within the list of offenses made extraditable under the treaty, and all the requirements of the treaty with respect to the demand having been complied with on the part of the United States, an obligation rested upon Peru to surrender him for trial and punishment, and therefore his trial and punishment cannot have been a violation of the treaty.

The plea in abatement admits that the crimes for which Ker was demanded are included among the offenses extraditable by the terms of the treaty, and that a messenger of the United States was in the capital of Peru, bearing a demand conforming to the requirements of the treaty. The crime and the demand were thus brought to the door of Peru, and *nothing remained* to effect the surrender and extradition of Ker, but the issue and execution of such process as it was the *treaty-made* duty of Peru to give. Had such process been executed, Ker would have been brought here, tried and punished. The *effect* upon Ker of the acts complained of is identical with what would have happened him if Peru had discharged her treaty obligation. Peru could not have rightfully granted or claimed immunity for him, much less, in the silence of Peru, can he claim immunity for himself. If every act, from the moment of his capture, is declared illegal, and Ker returned to the place whence he was taken, it will, at that instant, be the duty of Peru to surrender him to the United States for trial. Two more trips across the sea would be the outcome to Ker of this extraordinary venture. The United States might feel a little better, but we doubt if Ker would share in that feeling.

In our argument before the State. Supreme court we cited the case of an old neighbor in Maine who, when killing time came went out to the pen to kill a pig that was something of a pet. Upon being playfully scratched on the back the pig lay down and went to sleep. The honest old Maine man could not take advantage of this confidence, so kicking it up, he drove it squealing around the pen until it was caught, pulled down and stuck *honorably.* Our opponents indulged their talent of ridicule upon the illustration, but after reflection, we stand by and repeat the case *as in point.*

Fourth. No question under a treaty of the United States is involved in this case.

If the captors of Ker acted outside of the authority of the treaty, they were at most, guilty only of a tort upon his personal rights. The wrong thus done may be remediable under the municipal law of Peru, but is no part of the subject matter of the treaty in question.

The treaty is not one of guaranty, by the United States, that her private citizens will not be guilty of offenses against the municipal law of Peru. Neither does the United States promise in the treaty that the arm of our law shall not be laid upon its offenders until the private wrongs of the offender have all been righted. The case between the People and Ker involved the question merely of his guilt under the criminal laws of Illinois, and it is at least a novel thing if the United States have agreed to postpone action upon that question until all private grievances of Ker against citizens of the United States have been first settled. There is no connection between the supposed wrong on Ker's personal liberty, by those who happen to be citizens of the United States, and Ker's amenability to punishment for the crimes committed against the People; and the administration of relief in the one case ought not to interfere with the administration of justice in the other.

Having passed upon the law questions raised by this hearing, the court may have interest enough in the man and the crime which these questions are put forward to shield, to read another page concerning them. In the month of January, 1883, Frederick M. Ker, having been for many years the confidential clerk for Preston, Kean & Co., bankers of Chicago, asked permission to go to New Orleans for a rest from his labors. When the time for his vacation expired, the bankers instead of *receiving* their clerk, received a letter from him, postmarked at Chicago, in which he generously informed them that there were deficits in his accounts, and the amount of the embezzlement would be found to be about $21,000 of the moneys of the bank, and $35,000 of United States bonds belonging to its patrons. The letter contained an intimation that if allowed to take his journey unmolested, the bank would be let alone, but if pursued and brought back, a run would be organized and the bank ruined; and concluded with the cool remark that if successful in future life, he would endeavor to refund the money to those entitled to receive it. Preston, Kean & Co. were not alarmed by the threats, and inaugurated such measures that by the next steamer there went to Aspinwall one of Pinkerton's men, who at Panama found a Chicago overcoat which had been shed and given to a porter. Precaution had been taken to cut the tailor's name from the neck of the coat, but the name of Ker in one of the lappels of the side pocket remained untouched. Learning from the porter that the owner of the overcoat had sailed for Callao, the detective armed with photograph alone, followed by the next steamer. Arriving there, he went to Lima, and in a few days thereafter, while in a public square, recognized Ker sitting under the shade of a tropical tree, regaling himself with a cigar. An acquaintance followed. Ker could speak French and so could the detective. Becoming interested in each other, a friendship arose. Together they did the city, the theatre and the fandango. Investments were discussed; Ker had money, the detective had more, and thus dreaming and scheming, days passed into weeks and time wore happily away. In the meantime, at Chicago, the victimized bankers obtained the proper demand from the federal Secretary of State, which came by the next steamer to the friend in Lima. At this time, a state of things existed in Peru which rendered the treaty between the United States and that government inoperative. There was no Peru. The government had a nominal existence at Ariquipa, back in the mountains, eighty-five miles from Lima, but General Lynch, of the Chilian forces, was in military occupation of the capital. Pinkerton's man had no passport to go through the lines to present our demand at the mountain camp of the Peruvian government, but did what was perhaps the next best thing, applied to General Lynch. This officer, doubtless thinking that security to criminals was no part of his mission in Peru, dispatched an officer to aid the detective in putting Ker on his way back to the United States. On board the man-of-war, Essex, then in the harbor at Callao on her way to China, he was conducted to a state-room and transported to Honolulu, where it was expected to intercept the departure of a vessel to San Francisco. It happened, however, that this vessel had sailed when the Essex arrived outside the harbor, and Ker enjoyed the sea breezes on board his country's man-of-war for nearly a month, when the next steamer took him aboard for San Francisco. Having been brought to Chicago, Ker, in the course of time, was placed upon his trial. He interposed no denial of the charges of theft and embezzlement, but relied upon his ability to persuade the United States to take him back to Peru. The court below was not susceptible to these persuasions, and gave him ten years tuition in Joliet to improve his notions of business integrity. With what success his appeal will meet here, remains to be seen.

Geo Hunt
Attorney Gen
State of Illinois

a-
ed
lic

r
f
]

APPENDIX.

The following is the treaty for extradition between the United States and Peru of September 20, 1870 (Spear on Law of Extradition, page 395):

The United States of America and the Republic of Peru, having judged it expedient, with a view to the better administration of justice and the prevention of crime within their respective territories and jurisdictions, that persons charged with the crimes hereinafter enumerated, should, under certain circumstances, be reciprocally delivered up, have resolved to conclude a treaty for this purpose, and have named as their respective plenipotentiaries, that is to say: The president of the United States of America has appointed Alvin P. Hovey, envoy extraordinary and minister plenipotentiary of the United States of America, near the government of the Republic of Peru; and the president of Peru has appointed his excellency, Doctor José J. Loayza, minister of foreign affairs of Peru:

Who, after having communicated to each other their respective full powers, found in good and true form, have agreed upon and concluded the following articles:

ARTICLE I. It is agreed that the contracting parties shall, on requisition made in their name through the medium of their respective diplomatic agents, deliver up to justice persons who, being accused or convicted of the crimes enumerated in Article II of the present treaty, committed within the jurisdiction of the requiring party, shall seek an asylum, or shall be found within the territories of the other: *Provided*, That this shall be done only when the fact of the commission of the crime shall be so established as that the laws of the country in which the fugitive or the person so charged shall be found, would justify his or her apprehension and commitment for trial, if the crime had been there committed.

ARTICLE II. Persons shall be so delivered up who shall be charged, according to the provisions of this treaty, with any of the following crimes, whether as principals, accessories or accomplices, to wit:

1. Murder, comprehending the crimes of parricide, assassination, poisoning and infanticide.

2. Rape, abduction by force.

3. Bigamy.

4. Arson.

5. Kidnapping, defining the same to be the taking or carrying away of a person by force or deception.

6. Robbery, highway robbery, larceny.

7. Burglary, defining the same to be the action of breaking and entering by night-time into the house of another person with the intent to commit a felony.

8. Counterfeiting or altering money, the introduction or fraudulent commerce of and in false coin and money; counterfeiting the certificates or obligations of the government, of bank notes, and of any other documents of public credit, and the uttering and use of the same; forging or altering judicial judgments or decrees of the government or courts, of the seals, dies, postage stamps and revenue stamps of the government, and the use of the same; forging public and authentic deeds and documents, both commercial and of banks, and the use of the same.

9. Embezzlement of public moneys committed within the jurisdiction of either party by public officers or bailees, and embezzlement by any person hired or salaried.

10. Fraudulent bankruptcy.

11. Fraudulent barratry.

12. Mutiny on board of a vessel when the persons who compose the crew have taken forcible possession of the same, or have transferred the ship to pirates.

13. Severe injuries intentionally caused on railroads, to telegraph lines or to persons by means of explosions of mines or steam-boilers.

14. Piracy.

ARTICLE III. The provisions of the present treaty shall not be applied in any manner to any crime or offense of a purely political character, nor shall the provisions of the present treaty be applied in any manner to the crimes enumerated in the second article, committed anterior to the date of the exchange of the ratifications hereof. Neither of the contracting parties shall be bound to deliver up its own citizens under the stipulations of this treaty.

ARTICLE IV. The extradition will be granted in virtue of the demand made by the one government on the other, with the remission of a condemnatory sentence, an order of arrest, or of any other process equivalent to such order in which will be specified the character and gravity of the imputed acts, and the dispositions of the penal laws relative to the case. The documents accompanying the demand for extradition shall be originals or certified copies, legally authorized by the tribunals or by a competent person. If possible, there shall be remitted at the same time a descriptive list of the individual required, or any other proof toward his identity.

Article V. If the person accused or condemned is not a citizen of either of the contracting parties, the government granting the extradition will inform the government of the country to which the accused or condemned may belong of the demand made, and if the last-named government reclaims the individual on its own account for trial in its own tribunals, the government to which was made the demand of extradition may, at will, deliver the criminal to the state in whose territory the crime was committed, or to that to which the criminal belongs. If the accused or sentenced person whose extradition may be demanded in virtue of the present convention from one of the contracting parties, should, at the same time, be the subject of claims from one or other governments simultaneously, for crimes or misdemeanors committed in their respective territories, he or she shall be delivered up to that government in whose territories the offense committed was of the gravest character, and when the offenses are of like nature and gravity, the delivery will be made to the government making the first demand, and if the dates of the demands be the same, that of the nation to which the criminal may belong will be preferred.

Article VI. If the person claimed is accused or sentenced in the country where he may have taken refuge, for a crime or misdemeanor committed in that country, his delivery may be delayed until the definitive sentence releasing him be pronounced, or until such time as he may have complied with the punishment inflicted on him in the country where he took refuge.

Article VII. In cases not admitting of delay, and especially in those where there is danger of escape, each of the two governments, authorized by the order for apprehension may, by the most expeditious means, ask and obtain the arrest of the person accused or sentenced, on condition of presenting the said order for apprehension as soon as may be possible, not exceeding four months.

Article VIII. All expenses whatever of detention and delivery, effected in virtue of the preceding provisions, shall be borne and defrayed by the government in whose name the requisition shall have been made.

Article IX. This treaty shall commence from the date of the exchange of the ratifications, and shall continue in force until it shall be abrogated by the contracting parties, or one of them; but it shall not be abrogated, except by mutual consent, unless the party desiring to abrogate it shall give twelve months' previous notice.

The present treaty shall be ratified in conformity with the constitutions of the two countries, and the ratifications shall be exchanged at the cities of Washington or Lima, within eighteen months from the date hereof, or sooner if possible.

In witness whereof, we, the plenipotentiaries of the United States of America and the Republic of Peru, have signed and sealed these presents.

Done in the city of Lima, in duplicate, English and Spanish, this, the twentieth day of September, in the year of our Lord, one thousand, eight hundred and seventy.

[SEAL.] Alvin H. Hovey.
[SEAL.] Jose' J. Loayza.